Supreme Court, U.S.
FILED

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No.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THOMAS W. HILL,

Petitioner,

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,

Respondents.

Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR EXTRAORDINARY WRIT, AND IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI

THOMAS W. HILL,
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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. An extraordinary writ should be issued requiring the United States District Court to enter findings *de novo* regarding federal employee claims of age discrimination, rather than deferring to the Court of Appeals for the Federal Circuit for adjudication of merit of claim contained in administrative record and barring review by the District Court in favor of Federal Circuit review of the administrative record.

2. In the alternative, certiorari should be granted to resolve the conflict between the Tenth Circuit and other circuits which have considered the matter of whether deference should be afforded to adverse decisions of the Federal Circuit regarding appeals of decisions of the Merit Systems Protection Board ("MSPB") which involve claims of discrimination.

3. Certiorari should be granted to resolve the conflict between the Tenth Circuit and other circuits regarding the extent to which provisions of the Civil Service Reform Act are to be construed as barring complaints of federal employees filed under provisions of the Privacy Act, especially in instances where the District Court has found that the agency maintained improper security clearance records willfully designed to inflict damages and has further found that agency refusal to adjudicate the file is in violation of the requirements of its own controlling regulation.

4. With regard to the issue of individual versus agency liability addressed by recently-enacted legislation, *i.e.*, the Federal Employees Liability Reform and Tort Compensation Act of 1988 and the Whistleblower Protection Act of 1989, certiorari should be granted to clarify the extent of liability for deliberate violation of constitutional rights of federal employee which the District Court specifically found to be "something other than 'personnel actions' within the purview of any statutory scheme".

PARTIES TO THE PROCEEDING

Petitioner, Thomas W. Hill, a space systems analyst holding a doctorate degree in physics, was continuously employed by Defendant Air Force as a general schedule ("GS") employee at various locations from January 1966 to July 1985. At the time suit was initiated in November 1985 Hill resided in Albuquerque, New Mexico; he now resides in San Pedro, California. Hill was the Plaintiff in the lower court proceedings of this case and was the Appellant before the Tenth Circuit Court of Appeals in Appeal No. 95-2017.

Respondent Department of the Air Force is an agency of the executive branch of the federal government. The Air Force was the Defendant in the lower court action and has been represented by the United States Attorney throughout the proceedings. As an Appellant, the agency has filed three interlocutory appeals with the Tenth Circuit, prevailing on all counts. The agency was the Appellee in Tenth Circuit Appeal No. 95-2017.

The Merit Systems Protection Board ("MSPB") is a quasi-judicial agency of the executive branch of the federal government, created pursuant to the provisions of the Civil Service Reform Act of 1978. Under leave granted by the District Court in January 1986, the MSPB was added as a Defendant in the lower court action. Following refusal by the Federal Circuit to transfer record review to the District Court, the District Court released the MSPB as a Defendant.

Respondents Paul S. Britt and Paul J. Vallerie were officers in the Air Force and were supervisory officials above Plaintiff prior to the time suit was filed. Britt was an Appellant in two of the above-referenced interlocutory appeals. Both Respondents were Appellees in Tenth Circuit Appeal No. 95-2017, and both are represented by the United States Attorney.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations v

Opinions Below 1

Statement of Jurisdiction 2

Statutes Invoked 2

Statement of the Case 4

Reasons for Granting the Writ 9

I. A Writ Should Be Issued Requiring the District Court to Enter *De Novo* Discrimination Findings 9

II. Certiorari Should Be Granted To Resolve The Conflict Between The Tenth Circuit And Other Circuits Regarding Deference To Federal Circuit Discrimination Decisions 11

III. Certiorari Should Be Granted To Resolve The Conflict Between The Tenth Circuit And The District of Columbia Circuit Regarding Statutory Rights Of Federal Employees Under The Privacy Act 12

TABLE OF CONTENTS (con't.)

Page

IV. The Public Interest Is Not Served By The Shield Of Absolute Immunity Which Has Been Afforded To Minor Federal Employees Who Knew That Their Actions Violated Another's Constitutional Rights 14

Conclusion 16

APPENDIX A - Findings of Fact Entered by the United States District Court for the District of New Mexico, Following June 1986 Hearing. Filed September 18, 1986 ..... A-1

APPENDIX B - Summary Judgment Order Entered by the District Court. Filed January 11, 1993 ..... B-1

APPENDIX C - Denial of Petition for a Writ and Opinion of the United States Court of Appeals for the Tenth Circuit. Filed October 20, 1995 ..... C-1

APPENDIX D - Denial of Petition for Rehearing by the United States Court of Appeals for the Tenth Circuit. Filed December 14, 1995 ..... D-1

TABLE OF CITATIONS

Cases Cited *Page*

Astoria F.S. & L. Ass'n. v. Solimino, 501 U.S. ___, 115 L.Ed.2d 96, 107 (1991) 10

Brewer v. U.S. Postal Service, 647 F.2d 1093, 1096 (Fed.Cir. 1981), *cert. denied*, 454 U.S. 1141 (1982) 9

Chandler v. Roudebush, 425 U.S. 840 (1976) 10

Cohen v. Austin, 833 F.Supp. 512, 516 (E.D.Pa. 1993) 11

Dept. of Navy v. Egan, 108 S.Ct. 818 (1988) 7

Hill v. Dept. of Air Force, 796 F.2d 1469 (Fed.Cir. 1986) 7, 11

Hill v. Dept. of Air Force, 844 F.2d 1047 (10th Cir. 1986), *cert. denied*, 488 U.S. 825 (1988) 7

Hill v. Dept. of Air Force, 884 F.2d 1318 (10th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) 7

Kean v. Stone, 926 F.2d 276, 285-6 (3rd Cir. 1991) 11

Miller v. Dept. of Air Force, 39 EPD ¶ 36,006 (D. Mass. 1985) 11

TABLE OF CITATIONS (con't.)

Cases Cited (con.t.) *Page*

Strang v. U.S. Arms Control & Disarmament Agency, 864 F.2d 859 (D.C.Cir. 1989) 12

Statutes Cited

Age Discrimination in Employment Act, 29 U.S.C. § 631, 633a .... passim

Civil Service Reform Act, 5 U.S.C. § 7702 2

Privacy Act of 1974, As Amended, 5 U.S.C. § 552a 3

Federal Employees Liability Reform and Tort Compensation Act of 1988 15

Whistleblower Protection Act of 1989 15

5 U.S.C.A. § 1222 (Supp. 1990) 14

Other Authority Cited

Congressional Record, Senate Report No. 969, 95th Cong., 2d Sess., reprinted in [1978]. U.S. Code Cong.& Ad. News, at 2785 12

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THOMAS W. HILL,

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DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,

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Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR EXTRAORDINARY WRIT, AND IN THE ALTERNATIVE, WRIT OF CERTIORARI

OPINIONS BELOW

In an unpublished order dated October 20, 1995, the Tenth Circuit Court of Appeals entered its opinion in this matter, affirming the final judgment of the District Court. Hill's petition for rehearing was denied on December 14, 1995 (Appendix D).

STATEMENT OF JURISDICTION

Under the jurisdiction afforded by 28 U.S.C. § 1651(a), Petitioner seeks an Extraordinary Writ directed to the United States District Court for the District of New Mexico, vacating a summary disposition Order (Appendix B) and requiring the District Court to enter findings *de novo* regarding claims of age discrimination in Petitioner's firing by the Air Force and the removal of his name from the list of candidates for a hiring action at the Air Force Space Division.

In the alternative, Petitioner seeks review of the opinion of the United States Court of Appeals for the Tenth Circuit and its judgment entered on October 20, 1995 (Appendix C), for which rehearing was denied on December 14, 1995 (Appendix D). The judgment affirmed the District Court's grant of summary disposition of claims alleged under the provisions of the Privacy Act and the Age Discrimination in Employment Act. Petitioner invokes the certiorari jurisdiction conferred on the Supreme Court by 28 U.S.C. § 1254(1).

STATUTES INVOKED

5 U.S.C. § 7702 provides, in pertinent part,

"(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who –

> "(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and
>
> "(B) alleges that a basis for the action was discrimination prohibited by – ...

"(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631,633a), ...

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section. ...

"(e)(1) Notwithstanding any other provision of law, if at any time after -- ...

"(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not the result of the filing of a petition by the employee under subsection (b)(1) of this section), ...

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in ... section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)) ...

"(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section."

5 U.S.C. § 552a(g) provides, in pertinent part,

"(g)(1) CIVIL REMEDIES. -- whenever any agency ...

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; ...

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection. ...

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of –

"(A) actual damages sustained by the individual as a result of the refusal or failure ..."

STATEMENT OF THE CASE

Petitioner Hill is a former civil servant with a 20-year career distinguished by awards, commendations and outstanding performance ratings, who in separate actions was fired and suffered revocation of his security clearance as the direct result of steps taken by Paul S. Britt, the object of Hill's whistle-blowing. Britt stated that his actions were based on Hill's use of government telephones to make personal calls over a six-month period, which he claimed to be worth about $135.

Hill appealed the actions to the Merit Systems Protection Board ("MSPB"), which refused to consider the security suspension in any manner and upheld the firing despite clear indication of pretext. The MSPB also disallowed Hill's claim of age discrimination immediately after the filing of the appeal and before Hill had an opportunity to discover evidence that Britt sought to use the vacancy created by the firing to promote a favored younger employee named Robert Blankert. The MSPB presiding official later refused to reconsider the initial ruling or to defer to any discrimination authority during the appeal process.

In support of the security suspension, Britt generated a special security file ("SSF") which was maintained by agency officials under Hill's name and social security number, wherein Britt claimed that Hill was "amoral" and a "thief".[1] As a result of Britt's actions agency officials placed a "Z-code" by Hill's name in the agency's central computer, indicating the presence of derogatory information regarding suitability to hold a security clearance. The Z-code is disseminated throughout the defense industry.

By letter to Britt's superior, the Commander of Air Force Contract Management Division ("AFCMD"), Hill appealed Britt's security action and demanded the destruction of the SSF. Major General Bernard L. Weiss, the Commander, investigated the matter and wrote a letter[2] stating that the acts attributed to Hill did not have adverse security significance, that Hill's security record was unblemished, and that Britt's security action against Hill was unwarranted. However, agency officials refused to act on General Weiss' findings or to adjudicate or destroy the SSF. Hill was never afforded any type of hearing on the security matter notwithstanding requirements of the agency's own regulation that hearing must be had and that the SSF must be adjudicated even though the subject has left the employ of the agency.

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[1] Britt was present throughout the MSPB hearing, and was fully aware that Hill was not charged with theft. In response to Hill's defense that the agency had not shown any intent of theft, the agency denied that he was charged with that offense, and the MSPB hearing official stated,

> "Appellant has alleged that the agency failed to prove all the elements of theft. I find that the argument is irrelevant because appellant is not charged with theft; instead appellant is charged with conversion. The agency does not need to prove the criminal elements of theft."

[2] Agency officials refused to release General Weiss' letter until Ordered to do so by the District Court.

On 7 November 1985 Hill filed complaint in the United States District Court for the District of New Mexico (Civil No. 85-1485), invoking jurisdiction under the Privacy Act of 1974, As Amended, the Freedom of Information Act, and the Constitution of the United States, and demanding *inter alia* (1) an order requiring the agency to comply with the provisions of its controlling security regulation and (2) award of damages. When 120 days had expired without a judicially-reviewable decision having been provided by the MSPB, Hill amended the complaint on 29 November 1985 to include an age discrimination cause against the Air Force under provisions of 5 U.S.C. § 7702(e)(1) and 29 U.S.C. §§ 631, 633a. Hill sought *de novo* review of the firing action as well as the arbitrary removal of his name from the list of well-qualified candidates for a hiring action at the Air Force Space Division. Following the entry of a decision by the MSPB, Hill moved the Court for leave to amend to include the MSPB as a Defendant, pursuant to provisions of 5 U.S.C. § 7703. Leave was granted, and on 27 January 1986 Hill filed the operative second amended complaint, restructuring his causes and demanding damages under provisions of the Privacy Act.

Following a hearing conducted in June 1986, the District Court found (Appendix A) above-stated facts regarding the security clearance matter, hearing testimony that Britt had boasted that the indefinite suspension of Hill's clearance would foreclose Hill's future employment in the defense industry. The Court enjoined the agency to reinstate Hill's clearance and to remove the Z-code by his name in its security computer files.

At the time that he moved the Court for leave to amend to add the MSPB as a Defendant, Hill appealed the adverse MSPB ruling to the Court of Appeals for the Federal Circuit. Although the District Court granted leave to amend to add the MSPB as a Defendant and to include review of the MSPB record, the

Federal Circuit subsequently denied Hill's motion to transfer. Without addressing Hill's evidence, the Federal Circuit held[3] that Hill's claim before the MSPB was "frivolous" and later affirmed the MSPB decision with a terse unpublished judgment, despite Hill's submission of District Court findings entered in June 1986.

Upon agency appeal of the injunction, the Tenth Circuit remanded for jurisdiction clarification, and following the Supreme Court decision in *Dept. of Navy v. Egan*, 108 S.Ct. 818 (1988), reversed.[4] The Tenth Circuit held that the District Court lacked jurisdiction under due process, but declined to consider Hill's argument that the issue turned on provisions of the Age Discrimination in Employment Act ("ADEA") and the Privacy Act. The Court acknowledged that the courts have jurisdiction to order an agency to follow regulatory procedures, but anomalously held that the District Court had not found violation of such procedure.

In September 1987 the District Court entered dispositive Orders regarding Hill's Privacy Act, ADEA, and constitutional tort claims. In one memorandum opinion the Court declined to dismiss the Privacy Act cause, holding that Hill had raised a triable issue of damages. In another, the Court reluctantly dismissed the age discrimination claim, indicating that it was obligated to defer to the Federal Circuit decision. Hill appealed the dismissal and moved to include ADEA and Privacy Act issues in the pending security clearance appeal. The Tenth Circuit denied the motion and dismissed Hill's appeal as premature.

In denying Defendants' motion to dismiss a constitutional tort claim in 1987, the District Court held that Britt's "Gestapo-type

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[3] *Hill v. Dept. of Air Force*, 796 F.2d 1469 (Fed.Cir. 1986).

[4] *Hill v. Dept. of Air Force*, 844 F.2d 1407 (10th Cir. 1988), *cert. denied*, 488 U.S. 825 (1988).

tactics involving illegal surveillance and unwarranted takings" directed at Hill were "something other than 'personnel actions' within the purview of any statutory scheme". About a year later Defendants renewed their motion to dismiss Britt, and following denial by the District Court proceeded with a second interlocutory appeal. The Tenth Circuit assumed jurisdiction over Hill's protests, and again reversed.[5] The Court acknowledged that Britt's actions were not personnel actions, but effectively granted him absolute immunity because of his supervisory position.

The District Court took no further substantive action in the suit until the fall of 1992 when it set jury trial of Privacy Act damages for December 1992. In response to a motion by the Defendants, the Court vacated the trial and set oral argument on Defendants' renewed motion to dismiss. In January 1993 the Court granted the Defendants' motion and dismissed all trial issues. Appendix B. Although the Court did not state the basis for dismissal in its Order, the Defendants cited *Henderson v. Social Sec. Admin.*, 908 F.2d 559 (10th Cir. 1990), in support of their argument that construction of the Civil Service Reform Act ("CSRA") serves to bar statutory rights of federal employees under the provisions of the Privacy Act. Hill filed a Rule 59 motion which was denied without comment in November 1994.

Hill appealed the final judgment and petitioned the Tenth Circuit to issue a writ directing the District Court to enter its own findings in the discrimination matter. In October 1995 the Circuit Court denied the petition and dismissed the appeal without hearing oral argument, affirming the discrimination dismissal "for

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[5] *Hill v. Dept. of Air Force*, 884 F.2d 1318 (10th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). The Tenth Circuit also allowed a third interlocutory appeal filed on Britt's behalf regarding a minor order, and reversed the District Court a third time.

substantially the reasons stated by the district court."[6] Appendix C. The Court characterized matters involved in Britt's manipulation of the SSF,[7] which Hill complained of under provision of the Privacy Act, as "prohibited personnel practices, 5 U.S.C. § 2302".[8] Hill petitioned for rehearing, but the petition was denied on December 14, 1995.

REASONS FOR GRANTING A WRIT

I. A Writ Should Be Issued Requiring The District Court To Enter *De Novo* Discrimination Findings.

The Supreme Court has repeatedly held that the controlling statute compels the district courts to provide *de novo* review following administrative determination of discrimination claims and that such review must be provided to federal employees as

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[6] The District Court, as affirmed by the Tenth Circuit, held that the Federal Circuit had provided Hill *de novo* review of whether he had made a prima facie showing before the MSPB. However, this is not the standard specified at 5 U.S.C. §§ 7702(e)(3). Furthermore, the Federal Circuit has held in *Brewer v. U.S. Postal Service*, 647 F.2d 1093, 1096 (Fed.Cir. 1981), *cert. denied*, 454 U.S. 1141 (1982),

> "In determining whether the Board's decision is supported by substantial evidence, the standard is **not** what the Court would believe on a *de novo* appraisal ..."

[7] In a footnote the Tenth Circuit panel stated that Hill did not appeal dismissal of his records amendment cause. The Notice of Appeal and Hill's main brief oppose this conclusion.

[8] The District Court also labeled the arbitrary removal of Hill's name from a list of eligible candidates for a position at Air Force Space Division and the use of that position to promote a "less senior" employee as a "prohibited personnel practice under 5 U.S.C. § 2302".

well as other complainants. See, *Chandler v. Roudebush*, 425 U.S. 840 (1976) (overruling a plurality of circuit courts); also, *Astoria F.S. & L. Ass'n. v. Solimino*, 501 U.S. ____, 115 L.Ed.2d 96, 107 (1991), holding,

> "Administrative findings with respect to the age discrimination claims of federal employees enjoy no preclusive effect in subsequent judicial litigation ..."

However, the District Court has concluded that Hill's legal right to *de novo* review is precluded on the basis of the MSPB determination in August 1985 that Hill's age discrimination claim was "frivolous". The District Court stated that the question of whether Hill's case was "mixed" was "a close one", holding,

> "Had the appeal been lodged originally in this Court, it is not inconceivable that the Court would have considered it a 'mixed case' and proceeded with review accordingly, including *de novo* review of Plaintiff's allegations of age discrimination. However, the Court is faced with the *fait accompli* that the Federal Circuit has already reviewed and affirmed the matter on the merit..."

> "The Court is not totally comfortable with the Federal Circuit's decision to assume exclusive jurisdiction over the appeal..."

Clearly, the Tenth Circuit opinion, sanctioning the District Court decision to bar Hill's claim of age discrimination on the basis of the results of an administrative decision, has so far departed from the requirements of the law as decided by the Supreme Court in *Chandler* and *Astoria* as to call for the exercise of the supervisory power of the Court.

Of additional importance is the fact that limiting the discrimination review to the MSPB administrative record as it stood in August 1985 foreclosed Hill's right to consideration of facts which were not available until that record had been closed. Specifically, Hill was able to show by affidavit executed by John Gowan, Deputy Director of AFCMD/SA, that the agency waited until the transfer motion had been denied to fill Hill's position by promoting a younger employee named Robert Blankert.

II. Certiorari Should Be Granted To Resolve The Conflict Between The Tenth Circuit And Other Circuits Regarding Deference To Federal Circuit Discrimination Decisions.

Other circuits which have considered Federal Circuit decisions involving discrimination have concluded that preclusive effect cannot be afforded to such decisions. See, *Kean v. Stone*, 926 F.2d 276 (3rd Cir. 1991), refusing to defer an attorney fee issue in a discrimination case before the MSPB (wherein the appellant had prevailed) to the jurisdiction of the Federal Circuit, and noting the anomaly of the Federal Circuit decision (*Kean*, p. 285 n.6; p. 286 n.7). See also, *Cohen v. Austin*, 833 F.Supp. 512, 516 (E.D.Pa. 1993), discussing the Federal Circuit decision in Hill's case at length and holding,

> "We note that *Hill* [*v. Dept. of Air Force*, 796 F.2d 1469 (Fed.Cir. 1986)] is not binding on this Court, as it is a Federal Circuit decision."

In the case of *Miller v. Dept. of Air Force*, 39 EPD ¶ 36,006 (D. Mass. 1985), the agency pled *res judicata* based on adverse results of a Federal Circuit decision and a showing that Miller had not raised a proper discrimination claim before the MSPB. The Massachusetts District Court denied the agency's motion to dismiss, holding,

> "Plaintiff argues that the Federal Circuit decision of December 17, 1984, cannot be given *res judicata* effect because the Federal Circuit would not have had jurisdiction over Miller's discrimination claim if he had raised it there. That is correct. *Chang v. MSPB*, 677 F.2d 173 (1st Cir. 1982) (per curiam)... [D]efendant wants this Court to give preclusive effect to the MSPB decision. That can not be done because federal employees, after administrative adjudication, are entitled to a *de novo* trial in the district court of their discrimination claims. *Chandler v. Roudebush* [11 EPD ¶10,957], 425 U.S. 840 (1974). Even if the MSPB had decided the discrimination issue, that decision would not preclude district court review..."

Moreover, the Congressional Record shows that Congress did not intend that the Federal Circuit review discrimination claims. Congressional Record, Senate Report No. 969, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong.& Ad. News, at 2785,

> "To encourage uniformity in judicial decisions in this area both kinds of cases should continue to be considered by the U.S. District Court."

III. Certiorari Should Be Granted To Resolve The Conflict Between The Tenth Circuit And The District of Columbia Circuit Regarding Statutory Rights Of Federal Employees Under The Privacy Act.

Strang v. U.S. Arms Control & Disarmament Agency ("ACDA"), 864 F.2d 859 (D.C.Cir. 1989), post-dates the decisions in *Hill*, 844 F.2d 1407, and *Egan, supra*, and is in

conflict with the Tenth Circuit holding.[9] Underlying *Strang* is the indisputable position that records used to determine an employee's suitability for a security clearance are subject to the standard of "accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual" mandated by the Privacy Act. *Id.*, 864-868,

> "The Privacy Act requires that a court consider de novo an agency's refusal to amend its records. 5 U.S.C. § 552a(g)(2)(A). The lack of evidence before the district court supporting ACDA's conclusion that some information was uncleared and the Court's Memorandum Opinion make it evident that the court failed to consider this matter de novo ..."

The D.C. Circuit disallowed Strang's claim for damages under sections (g)(1)(C) and (g)(4) of the Privacy Act since Strang was unable to show "that the ACDA's determination to suspend her and revoke her codeword clearance was caused by its intentional or willful failure to maintain accurate records". *Id.*, at 867. Instead, the district court had found that the ACDA had believed that its actions were lawful, and the records for which accuracy was in question and formed the basis for remand to the district court "played no part in ... revocation of her codeword clearance." *Id.* This stands in contrast to Hill's case[10] where (1)

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[9] *Strang* addresses statutory rights of employees regarding security clearance records vis-a-vis the Privacy Act, whereas the Tenth Circuit decision in *Hill, supra*, is limited to construction of constitutional rights.

[10] On 30 June 1985, after seeing the record created by Britt and filed under Hill's name and social security number which would form the basis of the SSF, Hill demanded in writing that the agency amend the file. See ¶ 3 of Ex. "6" of the Second Amended Complaint, "I respectfully request that the file be destroyed as provided by the regulation." The agency never acted on the request.

he never had any type of security violations, (2) Britt's maliciously generated record formed the sole basis for the action, and (3) the Court found agency actions to be intentional

Noticeably absent from *Strang* is a holding that construction vis-a-vis the CSRA foreclosed Strang's rights under the Privacy Act, even though Strang was suspended from her job. Furthermore, the damages which occurred to Hill as a result of agency refusal to adjudicate the referenced SSF occurred more than eight months after he had left the agency. The record shows that Hill received two offers employment in February 1986 which were withdrawn when the agency disseminated the Z-code to the prospective employers.

The construction of the CSRA to preclude Privacy Act (and ADEA) claims is opposed by federal law. See, 5 U.S.C.A. § 1222 (Supp. 1990), codifying in part the (retroactive) Whistleblower Protection Act of 1989,

> "Except as provided in Section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

IV. The Public Interest Is Not Served By The Shield Of Absolute Immunity Which Has Been Afforded To Minor Federal Employees Who Knew That Their Actions Violated Another's Constitutional Rights.

Since the time of the District Court ruling on Hill's constitutional causes, including a Federal Tort Claims Act ("FTCA") cause, federal law has changed significantly with regard to claims which may be pursued under the FTCA. The

Federal Employees Liability Reform and Tort Compensation Act of 1988 allows persons injured by common law torts committed by federal employees to sue for damages under the FTCA. The Whistleblower Protection Act of 1989 at 5 U.S.C. § 1214(a) through (h), creates an individual right of action..[11]

In the fifth cause of the complaint Hill specifically alleged that the defamation he endured violates "provisions of *the New Mexico Statutes*" and that he has suffered damage including "injury to reputation, mental anguish, impairment of earning ability, and loss of income". Materials obtained during discovery showed that Arthur L. Staden and Eric B. Nelson, who had no part in the firing action, had with assistance from David W. Hickman circulated various memoranda throughout the Air Force claiming that Hill had been fired because of "fraud and stealing". Following the issuance of the Court's findings (Appendix A), Hill moved for leave to amend to name Hickman as a Defendant, but his motion was denied.

The lower court actions have left Hill with a "Hobson's choice" -- he has not been permitted to pursue relief either against the agency or against the individuals who clearly knew that their actions violated Hill's constitutional rights. Since both of the referenced measures were passed while Hill's suit was pending and since both contain retroactive provisions, such a position is no longer viable, and clarification by the Supreme Court is appropriate.

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[11] Prior to the firing Hill filed a petition with the Office of the Special Counsel for an order staying the adverse action under a finding of the probable occurrence of a prohibited personnel practice. At the 13 June 1986 hearing, James H. Suttle testified that the investigator had recommended a stay of the firing but was overruled by then-Counsel O'Connor.

CONCLUSION

In summary, Hill should be afforded either (1) mandamus action enforcing previous, dispositive decisions of the Supreme Court regarding right to de novo review of age discrimination in the District Court, or (2) Supreme Court resolution, upon a grant of certiorari, of the conflict between the circuit courts regarding deference to the Federal Circuit in matters of discrimination. In addition, the Supreme Court should resolve the conflict between the circuits with regard to the extent to which the CSRA may serve as a bar to federal employee actions filed under the Privacy Act. Lastly, Hill pleads for review of the propriety of his constitutional claims against the background of the referenced remedial legislation, and for such other and further relief as may be deemed appropriate by the Court.

Respectfully submitted,

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APPENDIX A - FINDINGS OF FACT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FOLLOWING JUNE 1986 HEARING. FILED SEPTEMBER 18, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL,
Plaintiff,

v.

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, and
PAUL J. VALLERIE,
Defendants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on for a hearing on June 13 and 16, 1986, and the Court having adduced evidence, makes the following findings of fact and conclusions of law.

Findings of Fact

1. This matter comes before the Court on Plaintiff's motion for injunction wherein he seeks reinstatement of his security

clearance which was revoked on or about May 24, 1985; that on that date Plaintiff had a TOP SECRET clearance with access to Sensitive Compartmentalized Information.

2. Prior to Plaintiff's removal from Federal service on July 5, 1985, Plaintiff was a Federal civil servant employed by Defendant at the GS-13 and GS-14 grade levels and assigned, from July 1973 to July 1985, to the Directorate of Aerospace Studies at Kirtland Air Force Base, New Mexico, (AFCMD/SA).

3. During almost twenty years of his employment, Plaintiff was cleared for access to classified materials, the most recent level being TOP SECRET Sensitive Compartmentalized Information.

4. At the time of the revocation of his security clearance, Plaintiff was under the direct supervision of Colonel Paul Britt, the Director of AFCMD/SA.

5. The tensions between Plaintiff and Colonel Britt resulted from accusations of Colonel Britt that Plaintiff had made personal telephone calls at government expense on the Directorate's AUTOVAN telephone system; that Plaintiff responded to the allegations by accusing Colonel Britt of abusing TDY funds to pursue personal interests that, thereafter, Colonel Britt brought formal charges against Plaintiff for the unauthorized calls and, further, accused Plaintiff of theft for Plaintiff's removal of personal notes abandoned by a previous Directorate employee.

6. Major John Gowan, the Deputy Director of AFCMD /SA, upon being assigned to the unit, heard rumors and references regarding Plaintiff which he deemed to be unprofessional: that the Technical Director of AFCMD/SA referred to Dr. Hill as

"Dr. Moriarty"; that Plaintiff had been singled out for adverse and disparate treatment.

7. Major John Gowan gave special attention to Plaintiff because of the way management responded to Plaintiff; that he attempted to intercede between Plaintiff and Colonel Britt in order to resolve the problems in the Directorate; that Plaintiff at all times acted professionally and made reasonable professional attempts to reconcile all differences; that Colonel Britt was unresponsive and negative in manner; that Colonel Britt was not objective and made numerous statements reflecting a vindictive attitude; that Colonel Britt used any opportunity to place Plaintiff in an unfavorable light.

8. James H. Suttle, previously a 14-year civil servant, grade GS-14, with Aerospace Studies had known Colonel Britt since 1965 and had known Plaintiff since 1972-73; that he considered Colonel Britt a friend as well as a boss.

9. Mr. Suttle played the role of a mediator in order to diffuse tensions between Colonel Britt and Plaintiff but with no success; that he characterized Colonel Britt's management technique as that of a "threat type"; that this management style always had a "whipping boy"; and that Plaintiff was the brunt of Colonel Britt's technique.

10. Mr. Suttle testified that security clearances were used in a way to influence behavior during Colonel Britt's tenure and that of his predecessor; that disparate treatment was common regarding sanctions imposed for security violations.

11. In acting as a mediator, Mr. Suttle informed Colonel Britt that Plaintiff would drop certain grievances which he had in an effort to mediate differences so that he could go on with his

assigned duties; that this offer was refused; that Colonel Britt considered Plaintiff's grievances as a threat to Britt's authority and that Colonel Britt set out to "get him [Plaintiff]"; that Colonel Britt carried out a vendetta; and that Colonel Britt became obsessed with the "Hill problem."

12. As Major Gowan sought to act as an arbiter between Colonel Britt and Plaintiff, Colonel Britt became more alienated and informed Major Gowan that his actions in support of Hill were inappropriate; that, thereupon, Major Gowan requested to be transferred and he was subsequently transferred to the Emergency Directorate of CMD; that thereafter Colonel Britt sought means to have Major Gowan court-martialed for his having sided with Plaintiff.

13. Prior to his disaffection with Major Gowan because of his support of Plaintiff, Colonel Britt rated Major Gowan in the highest category possible in his officer effectiveness report of June 1985.

14. According to Major Gowan, Colonel Britt wanted Plaintiff out of the Air Force and "erased from memory"; that he referred to Plaintiff as a "non-person" and stated that he would do anything to "get Plaintiff"; that the removal of Plaintiff's security clearance was a means to "eradicate" Plaintiff.

15. In retaliation for Plaintiff's charges Colonel Britt revoked Plaintiff's security clearance on May 24, 1985, asserting that the revocation was in the interest of national security and alleging that Plaintiff had acted dishonestly; established a pattern of poor judgment and unreliable behavior and was untrustworthy; that, further, Colonel Britt established a special security file on Plaintiff; that Plaintiff was not given any opportunity to answer the allegations or otherwise contest the revocation.

16. Colonel Britt's actions were also motivated by Plaintiff's having filed suit against the agency in June 1984 and of his having filed grievances in the past.

17. On June 10, 1985, as a consequence of Colonel Britt's actions, the Air Force Security Clearance Office (AFSCO) placed a "pending adjudication" code by Plaintiff's name in its computer file and made that data available to all Department of Defense users; that the coded entry has prevented Plaintiff's access to classified materials until such time as the special security file on Plaintiff has been adjudicated; that as a consequence of Plaintiff's termination from Federal service the AFSCO has refused to adjudicate the file.

18. On July 31, 1985, AFSCO entered a "Z code" by Plaintiff's name in the AFSCO computer file; that the "Z code" indicates that Plaintiff has left the employ of the agency and that the agency possesses derogatory data regarding Plaintiff's suitability for a security clearance; that the "Z code" has damaged Plaintiff and precluded his employment in the defense community although Plaintiff's capabilities are in demand.

19. In a conversation with Mr. Suttle in Washington, D.C., Colonel Britt knew that Plaintiff was seeking other employment and acknowledged that the revocation of Plaintiff's security clearance would prevent Plaintiff from obtaining employment.

20. Mr. Suttle testified in favor of Plaintiff before the Merit Board, and as a consequence the Air Force retaliated against Suttle.

21. John Gowan, the Deputy Director of AFCMD/SA, and Mr. James H. Suttle, testified unequivocally that Plaintiff was not a security risk.

22. In reviewing Colonel Britt's actions in revoking Plaintiff's security clearance and questioning his eligibility, General Bernard L. Weiss, Commander of the Air Force Contract Management Division, made the following findings:

a. That the acts attributed to Plaintiff did not have adverse security significance.

b. That the facts of Plaintiff's case did not indicate that Plaintiff was a threat to national security.

c. That Plaintiff's security record during 20 years of service was unblemished and the withdrawal of Plaintiff's security clearance was unwarranted.

23. John W. Dettmer, Director of Strategic Defense Force, and prior director of the Technical Office in the Weapons Laboratory, testified of Plaintiff's excellent reputation and that Plaintiff was not a security risk.

24. In his performance evaluation by Lt. Colonel Paul J. Vallerie, Director of Aerospace Studies for the years 1982 and 1983, Plaintiff was rated as excelling in safeguarding classified information and following established security procedures.

25. According to the Department of Defense Personnel Security program, revocation of a security clearance for access to classified information is deemed to be an adverse action. Defendants' Exhibit F, p. 59, para. 8-lOO(a).

26. Pursuant to the Personnel Security program; Defendants are required to adjudicate all special security files

regardless of any other adverse action taken including separation. Defendants' Exhibit F, p. 60, para. 102(e)(2).

27. The actions of Colonel Britt with the assistance of Captain David W. Hickman, the Staff Judge Advocate, as reflected in the evidence, lead the Court to conclude that the revocation of Plaintiff's security clearance was not because of any adverse security significance but, rather, motivated solely by a deliberate intention to prevent Plaintiff from obtaining employment with civilian agencies who deal in the defense industry where security clearances are essential.

28. The Department of Air Force has failed to establish a rational nexus between the adverse action taken and the articulated reasons for the action.

29. Plaintiff's work opportunities have been severely limited by a fact determination which failed to comport with the traditional ideas of fair procedure; and that Defendants have failed to observe even the most minimal due process procedures in revoking Plaintiff's security clearance.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of, and the parties to, this action.

2. Plaintiff will be irreparably harmed if a preliminary injunction is not granted.

3. Plaintiff has made a prima facie case showing a reasonable probability that he will ultimately prevail on the merits.

4. The threatened injury to Plaintiff outweighs whatever damage the proposed preliminary injunction may cause Defendants.

5. The preliminary injunction, if issued, will not be adverse to the public interest.

6. A preliminary injunction should be issued enjoining the Department of Air Force to reinstate Plaintiff's security clearance to the level held prior to May 24, 1985; and, further, that the Department of Air Force should be enjoined to remove the "Z code" by Plaintiff's name in the AFSCO computer file and that the computer records should be programmed to indicate that Plaintiff is entitled to access to classified material consistent with the security clearance held prior to May 24, 1985; that the Department of Air Force notify all inquiring agencies of the reinstatement of Plaintiff's security clearance without derogatory information.

s/ Juan G. Burciaga
Juan G. Burciaga
United States District Judge

APPENDIX B - SUMMARY JUDGMENT ORDER ENTERED BY THE DISTRICT COURT. FILED JANUARY 11, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL,

Plaintiff,

v.

DEPARTMENT OF AIR FORCE,

Defendant.

ORDER

THIS MATTER came on for a hearing on January 7, 1993 on Defendant's April 8, 1988 motion to dismiss that portion of Plaintiff's second cause of action which remains after the Court's 4 September 1987 dismissal of a portion of Plaintiff's second cause of action. The Court having heard the arguments of counsel, reviewed the submissions of the parties, and made its findings and conclusions in open Court;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's motion to dismiss be, and hereby is, granted.

IT IS FURTHER ORDERED that Plaintiff's December 14, 1992 request (motion) for leave to amend second cause of action to conform with the facts be, and hereby is, denied.

IT IS FURTHER ORDERED that the Court sua sponte grants summary judgment for Plaintiff on his request in Count III of the second amended complaint for copies of Equipment Action Requests (AU Forms 601) for AFCMD /SA for the period of 1 January 1983 to 5 June 1985.

DATED this 8th day of January, 1993.

s/ Juan G. Burciaga
Chief Judge

APPENDIX C - DENIAL OF PETITION FOR A WRIT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.
FILED OCTOBER 20, 1995.

No. 95-2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS W. HILL,

Plaintiff-Appellant,

v.

UNITED STATES AIR FORCE, PAUL S. BRITT, PAUL J. VALLERIE,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before KELLY, SETH, and HENRY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R. App.P. 34(a); 10th Cir. R. 34.1.9. This case is therefore ordered submitted without oral argument.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the Court's General Order filed November 29, 1993. 151 F.R.D. 470.

Plaintiff appeals from the district court's dismissal of his age discrimination, 29 U.S.C. §§ 631, 633a, and Privacy Act, 5 U.S.C. § 552a, claims brought against defendant United States Air Force and his constitutional claims brought against the individual defendants. The parties are familiar with the lengthy and complex factual and procedural history of this case, commenced in 1985. Therefore, we proceed directly to the issues on appeal.

Plaintiff first argues that the district court erred in refusing to provide him with a de novo trial of his age discrimination claim. The district court dismissed the age discrimination claim for lack of subject matter jurisdiction based on the jurisdictional determination of the Federal Circuit that because plaintiff did not raise a prima facie case of age discrimination within his Merit Systems Protection Board appeal, jurisdiction was properly before the Federal Circuit, *see, Hill v. Department of Air Force*, 796 F.2d 1469, 1471 (Fed.Cir. 1986). Reviewing the district court's dismissal of the age discrimination claim de novo, *see Cizek v. United States*, 953 F.2d 1232, 1233 (10th Cir. 1992) (subject matter jurisdiction), we affirm for substantially the reasons stated by the district court.

Plaintiff next argues that he is entitled to trial of his Privacy Act damages claim [1] and that he should have been permitted to supplement his complaint to include details concerning the extent of the adverse agency actions regarding his security clearance. We agree with the district court's determination that the Privacy Act did not provide the court with jurisdiction to review the alleged prohibited personnel practices, 5 U.S.C. § 2302, because

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[1] Plaintiff does not appeal the district court's dismissal of the portion of the Privacy Act claim seeking amendment of his employment records.

the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.), provides an exclusive remedial scheme. *See also Henderson v. Social Sec. Admin.*, 908 F.2d 559, 560 (10th Cir. 1990). We also affirm the dismissal of this claim and conclude the district court did not err in failing to permit amendment of the complaint.

Plaintiff's final argument is that he is entitled to "some relief" under the constitutional claims against the defendants. Plaintiff concedes that this court already has decided his claim against defendant Britt. *See Hill v. Department of Air Force*, 884 F.2d 1318 (10th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). Thus, the law of the case doctrine applies to preclude further consideration of that claim. *See Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995). We agree with the district court's dismissal of the claim against defendant Vallerie as precluded by a comprehensive statutory scheme. We affirm that claim for substantially the reasons set forth by the district court, as well as for the reasons set forth in *Hill*, 884 F.2d 1318.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED. Plaintiff's petition for a writ seeking an order directing the district court to hold a trial on the age discrimination claim in DENIED. *See Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989) (petitioner must prove he lacks alternatives to obtain relief); *see also Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994) (mandamus is not substitute for appeal). Plaintiff motion for leave to file a replacement reply brief is GRANTED. The mandate shall issue forthwith.

Entered for the Court
Paul J. Kelly, Jr.
Circuit Judge

APPENDIX D - DENIAL OF PETITION FOR RE-HEARING BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.
FILED DECEMBER 14, 1995.

No. 95-2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS W. HILL,

Plaintiff-Appellant,

v.

UNITED STATES AIR FORCE, PAUL S. BRITT, PAUL J. VALLERIE,

Defendants-Appellees.

ORDER

Entered December 14, 1995

Before Kelly, Seth, and Henry, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted

to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk
By: s/ Audrey F. Weigel
Deputy Clerk

(2)

No. 95-1498

Supreme Court, U.S.
FILED
APR 15 1996
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. HILL,
Plaintiff/ Petitioner,

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,
Defendants/ Respondents.

On Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF SEEKING REMAND FOR PROCEEDINGS CONSISTENT WITH SUPREME COURT OPINION IN *O'CONNOR v. CONSOLIDATED COIN CATERERS*

THOMAS W. HILL,
Petitioner, Pro Se
1419 Stonewood Court
San Pedro, California 90732
(310) 831-4322

18pp

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations	ii
Basis for Supplement	1
I. The Holdings Of *O'Connor* Are Applicable To The Facts Underlying This Petition.	1
II. The Merit Of Hill's Age Discrimination Cause Has Never Been Addressed, And Remand Based On A Prima Facie Showing To Find Facts Which Have Been Misstated By The Courts Is What Justice Demands.	4
1. Federal Circuit Misstatement	5
2. Tenth Circuit Misstatement	8
3. D.C. Circuit Misstatement	10
4. District Court Misstatement	12
Conclusion	13

TABLE OF CITATIONS

Cases Cited *Page*

O'Connor v. Consolidated Coin Caterers, Inc.,
S. Ct. No. 95-354 (decided 1 April 1996) 1

Hill v. Dept. of Air Force, 796 F.2d 1469
(Fed.Cir. 1986) 3, 5

Hill v. Dept. of Air Force, 844 F.2d 1047
(10th Cir. 1986), *cert. denied*,
488 U.S. 825 (1988) 8

Hill v. U.S. Air Force, 795 F.2d 1067
(D.C. Cir. 1986) 10, 15

Other

H.R. Rep. No. 805, 90th Cong., 1st Sess.,
reprinted in 1967 U.S. Code Cong. &
Ad. News, 2220 8

BASIS FOR SUPPLEMENT

Pursuant to the provisions of Rule 15.8 of the Supreme Court Rules, Plaintiff/ Petitioner Thomas W. Hill hereby submits this supplement to his alternative petition for certiorari, calling attention to the case of *O'Connor v. Consolidated Coin Caterers, Inc.*, Supreme Court No. 95-354, decided on 1 April 1996. Petitioner shows the Court that the *O'Connor* decision, which was not available at the time of filing of the petition, has applicability to the circumstances underlying this action, and that the matter should be remanded to the District Court for proceedings consistent with the *O'Connor* opinion. Based upon discussion with Mr. Paul Bender of the Office of the Solicitor General, Defendants/ Respondents do not oppose this supplemental filing.

I. The Holdings of *O'Connor* Are Applicable To Facts Underlying This Petition.

In the O'Connor decision, the Court has stated,

> "[T]he question presented for our determination is what elements must be shown in an ADEA case to establish the prima facie case that triggers the employer's burden of production. ...
>
> "The discrimination prohibited by the ADEA is discrimination because of an individual's age, 29 U.S.C. 623(a)(1), though the prohibition is limited to individuals who are at least 40 years of age, 631(a). This language does not ban discrimination against employees because they are 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those

> who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age."

Facts of record in the District Court action show that Plaintiff's age was a motivating factor in the decisions of agency officials who (1) terminated his employment with the federal service and (2) rejected his attempt to obtain employment at the Air Force Space Division. Under the *O'Connor* standard, Respondents' defense of record that the younger employee who replaced Plaintiff was also age-protected is irrelevant to Plaintiff's prima facie showings.

1. As evidenced by declarations of John G. Gowan and Plaintiff (Stay Application No. A-447, Appendix pp. 11-14), the position which became vacant as a result of Hill's firing was used to promote a younger employee named Robert Blankert. When Hill first learned this fact, he sought admissions from Defendants on 21 July 1986 regarding Blankert's promotion, including admission of the statement that "Mr. Blankert is younger than plaintiff". Defendants responded,

> "**Denied**, in the sense of the Age Discrimination in Employment Act, as both Plaintiff and Mr. Blankert have been in the protected class for all times relevant to this suit. However, Mr. Blankert's birth date is protected under the Privacy Act, and cannot be released without a Court order."

Hill attached the response to a pleading (DNM Dkt. Nos. 302, 303) and moved the Court to deem admitted the fact that he had been "replaced by Mr Robert Blankert; a civil servant

considerably younger than the plaintiff". However, the Court entered its memorandum opinion, barring Hill's right to *de novo* review under holdings of *Hill v. Dept. of Air Force*, 796 F.2d 1469 (Fed. Cir. 1986), without acting on the motion. Whether Blankert was ten years younger than Hill (as Hill believed), or whether he was only seven years younger (and age-protected at the time of promotion) is irrelevant, as the facts affirmed by Hill and Gowan are sufficient for a prima facie showing.

2. Prior to the firing, Hill applied for a position advertised at Space Division in Los Angeles and was judged highly qualified by a rating committee. However, his name was arbitrarily removed from the list of eligibles. On 16 October 1986 Hill took the deposition of William Jacoby, the selecting official,[1] and asked with regard to the position (DNM Dkt. No. 435, 443),

> "Q. Do you recall discussing the fact that you were looking for less senior personnel?
>
> A. [Jacoby]. Not specifically, but, although, that is true."

In addition to barring Hill's discrimination claim on the basis of the Federal Circuit decision, the District Court treated the non selection at Space Division "as a 'prohibited personnel practice' under 5 U.S.C. § 2302 that was properly consolidated in [Hill's] appeal to the MSPB". Stay Application

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[1] Jacoby claimed during his deposition that the position was never filled. However, the promotion file for the position, which was released in response to a Court Order (DNM Dkt. No. 496), opposes that claim.

No. A-447, Appendix p. 21.[2] The term "less senior" implies a younger person and supports a prima facie showing of discrimination, without regard to the exact age differential.[3]

II. The Merit Of Hill's Age Discrimination Cause Has Never Been Addressed, And Remand Based On A Prima Facie Showing To Find Facts Which Have Been Misstated By The Courts Is What Justice Demands.

Hill's cause at the appellate level has been a victim of District Court failure to find certain facts of importance, as well as misstatements of facts of record by the appellate courts. The following recitations -- involving Hill's causes before (1) the Federal Circuit, (2) the Tenth Circuit, (3) the D.C. Circuit, and (4) the U.S. District Court -- serve to illustrate this circumstance.

---

[2] The MSPB refused to consider the non selection. See MSPB order, dated 26 September 1985, *infra*,

> "The presiding official will not consider ... [Hill's] failure to be selected for positions ... "

[3] The District Court characterized Hill's complaint as pled on 27 January 1986. Subsequent discovery revealed facts of paramount importance to Hill's causes, which he could not possibly have known prior to discovery. Hill moved the Court on four occasions from November 1986 to April 1988 to include in the record discrimination findings of fact obtained from discovery, which continued until April 1988 (DNM Dkt. No. 496). Hill formally sought leave to amend the complaint on three occasions. The first request was denied on 21 September 1987, the second on 11 January 1993, and the third on 28 November 1994, including denial of Hill's FRCP 59 motion.

1. Federal Circuit Misstatement. In denying transfer of the MSPB record review to the District Court, the Federal Circuit held in *Hill v. Dept. of Air Force*, 796 F.2d 1469, 1470 (1986),

> "Dr. Hill was requested several times, by the agency and by the Board's presiding official, to state the basis for his claim of age discrimination. The record shows that Dr. Hill had several opportunities to respond, and to modify his answers ..." [footnote omitted]

The statement is simply not correct. The MSPB appeal[4] of the 5 July 1985 firing was docketed[5] by the MSPB on 16

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[4] In initiating the appeal, Hill entered the following information at ¶ 24 of MSPB Appeal Form 283,

> "Further, I have been subjected to unfair and discriminatory treatment. At the present time I do not have sufficient information to determine whether any of the causes listed, i.e., marital status, age, etc., are involved."

[5] The MSPB Regional Director entered the appeal filing order, appointing a presiding official and stating,

> "If the Board fails to adjudicate this appeal within 120 calendar days, the appellant is authorized to file a civil action in the appropriate U.S. District Court under ... section 15(c) of the Age Discrimination in Employment Act of 1967."

The MSPB did not adjudicate the appeal by 13 November 1985, which marked the expiration of a period of 120 days following the docketing of the appeal. See MSPB Decision DE 075 285 10204, which states,

> "This initial decision of the Merit Systems Protection Board will become a final decision and order of the Board

July 1985. The first order entered by the presiding official, dated 7 August 1985 before any discovery had been completed, states[6] [emphasis added],

> "DISCRIMINATION. ... The appellant is ordered to submit a more definite statement of the reasons why the appellant believes that discrimination and reprisal influenced the action ... **Appellant must file this response no later than August 16, 1985**."

Hill complied with a response filed on 16 August 1986, stating inter alia,[7]

> "Issues regarding the involvement of Dr Hill's age and physical condition will be clarified by further action involving the Directorate, and by further events relative to his health."

> on DEC 11 1985 unless a party files a petition for review with the Board on or before that date or the Board reopens the case on its own motion. ... A petition [for review by the Federal Circuit Court of Appeals] may not be filed while the case is pending before the Board."

On 29 November 1985 Hill filed an Amended Complaint in the District Court, alleging age discrimination.

[6] The entire MSPB record was filed with the District Court (DNM Dkt. No. 62), and was also included in the record on appeal (10 Cir. No. 95-2017, Dkt. No. 32).

[7] At the time of the firing Hill was under the care of a physician for a back injury.

However, on the same date that Hill moved to compel agency support of discovery, *i.e.*, 23 August 1985, the presiding official entered an order stating [emphasis added],

> "In his appeal, appellant also raised a general allegation of discrimination. ... I find that none of appellant's explanations present a non frivolous allegation of discrimination. Therefore, **I will not allow appellant to present evidence on these allegations**."

In response to Hill's motion to include review of age discrimination, the presiding official ordered on 26 September 1985,[8]

> "The presiding official will not consider the suspension of appellant's security clearance, his failure to be selected for positions, the merits of his past disciplinary record, his allegations of discrimination, or the merits of his protected activities ..."

It is therefore indisputable that Hill had a single opportunity[9] to support his age discrimination cause before the MSPB, that the window lasted from 7 to 16 August 1985, *i.e.*, a total of nine days (including mailing the MSPB order from Denver to Albuquerque), and that a claim of "several

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[8] The MSPB official's exclusion of consideration of the age discrimination cause violates the MSPB's own regulation as stated at 5 C.F.R. § 1201.151.

[9] It is also indisputable that neither the MSPB nor the agency ever informed Hill of his right to have the matter heard by the agency's EEO authority, nor of procedures for obtaining such review. The controlling regulation at 29 C.F.R. § 1613.403 requires that an appellant be so informed

opportunities" cannot be supported. Furthermore, the MSPB record did contain age discriminatory evidence which was rejected by the Federal Circuit, apparently because it did not fit into a prescribed mold.[10] At pages 694-5 of the MSPB transcript (Stay Application No. A-447, Appendix pp. 61-65), the agency's telephone control expert (William Giese) testified that no action was taken against a "young man" for the same type of telephone use for which Hill was fired, and further testified that he was not aware of a single instance of disciplinary action being taken against any individual other than Hill for such use.

2. Tenth Circuit Misstatement. In reversing the District Court preliminary injunction, the Tenth Circuit stated, *Hill v. Dept. of Air Force*, 844 F.2d 1047 (10th Cir. 1988),

> "Constitutional questions aside, however, courts do have the power to compel agencies to follow their own regulations. ... But the District Court made no finding that the Air Force violated any particular procedure ..."

Reference to District Court findings of fact compels a different conclusion (App. A - 5, A - 6),

> "17. On June 10, 1985, as a consequence of Colonel Britt's actions, the Air Force Security

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[10] See, H.R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Ad. News, 2220,

> "The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general [ADEA] prohibitions and provisions."

> Clearance Office (AFSCO) placed a 'pending adjudication' code by Plaintiff's name in its computer file and made that data available to all Department of Defense users, ... that as a consequence of Plaintiff's termination from federal service the AFSCO has refused to adjudicate the file ..."

> "26. Pursuant to the Personnel Security Program [AF Regulation 205-32], Defendants are required to adjudicate all special security files regardless of any other adverse action taken including separation. Defendants' Exhibit F, p. 60, para. 102(e)(2)."

The Tenth Circuit held that such violation would warrant remand to the agency directing compliance.[11] The Circuit Court then entered its own finding (*Hill*, 844 F.2d 1047),

> "Those facts [found by the MSPB] on their face value would make a remand regarding a top secret clearance a useless exercise."

The Defense Industrial Security Clearance Office (DISCO) viewed the matter in a different light, and upon completing the equivalent of a remand to AFSCO, did independently grant Hill a top secret security clearance, which he has held continuously since mid-1988. It seems fair to conclude that

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[11] The Tenth Circuit never afforded the District Court an opportunity to remand to the agency. The Circuit Court ordered that Hill's fourth cause be dismissed with prejudice, even though he specifically pled that the agency had not followed the provisions of AF Regulation 205-32 and demanded "mandamus action" (DNM Dkt. No. 28).

every review authority -- from Maj. Gen. Weiss to the U.S. District Court to the DISCO -- has regarded Britt's security suspension action against Hill as "unwarranted" and has also found "that the acts attributed to Plaintiff did not have adverse security significance" (App. A - 6).

3. D.C. Circuit Misstatement. The action now under review has roots in a 1984 D.C. District Court case (D.C. Civil No. 84-1952), wherein Hill accused the agency and Defendant Vallerie of maintaining an illegal system of records regarding Hill's conduct and job performance.

In May 1985 the D.C. District Court awarded summary judgment to the agency, holding that an involved extensive set of records were Vallerie's "personnel notes".[12] The agency served Hill with a notice of intent to remove him from federal service within one week following the Court's decision. Hill appealed the judgment and pled for equitable action to stay the reprisal. During oral argument before the D.C. Circuit, the Honorable Antonin Scalia referred to Hill's conduct in removing the records from Vallerie's desk following the latter's retirement as "breaking into" the desk. Although Hill strongly denied the charge during rebuttal argument, the Court stated in its *per curiam* opinion, *Hill v. U.S. Air Force*, 795 F.2d 1067 (D.C. Cir. 1986),

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[12] Summary judgment in favor of the agency was granted on the basis of affidavits executed by agency officials, although both Vallerie and Britt had denied under oath during the action that the involved records existed. Hill's opposing affidavit showed that Vallerie had circulated the records, had used them in his official capacity, and kept them filed under Hill's name and social security number. The fact that Vallerie had maintained the records without advertisement in the Federal Register was uncontested.

> "Shortly thereafter Vallerie retired from the Air Force. While his desk was vacant, Hill rifled through it and removed the Vallerie files concerning him. Appellant used these files to conduct depositions of several of his supervisors and later returned the files to the Air Force."

When Hill returned the records to the agency in 1984, he was given a reprimand for removing the files.[13] During the 1985 MSPB appeal, the presiding official refused to consider the propriety of the reprimand,[14] and agency officials have repeatedly used the reprimand and the Appellate Court statements to support their claims that Hill "stole" documents from the agency. However, the matter was reviewed by the District Court during the evidentiary hearing conducted on 13 and 16 June 1986. Upon hearing the testimonies of Britt,[15]

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[13] The reprimand was upheld following an agency grievance, even though the agency denied ownership of the records and even though though Vallerie had retired and had moved away by the time Hill retrieved them.

[14] See 26 September 1985 MSPB order, *supra*, holding that "The presiding official will not consider ... the merits of [Hill's] past disciplinary record ... "

[15] See Britt's testimony (16 June 1986 Hearing, Tr. Vol II, p. 148, 149; lodged on 17 October 1987).

> "The Court: Excuse me, did you say stolen documents?
>
> A [Britt]: I tend to use that as shorthand."
>
> ...
>
> "Q [Hill]: Do you know whether the Air Force ever charged me with theft?
>
> A [Britt]: They did not."

Hill, and other persons, and observing their conduct in court, the Court found (App. A - 2),

> "5. ... Colonel Britt ... accused Plaintiff of theft for Plaintiff's removal of personal notes **abandoned by a previous Directorate employee**."
> [Emphasis added.]

The Court also accepted the truth of testimony of Major John Gowan, Britt's deputy (*Id.*, A - 3),

> "7. ... that Plaintiff at all times acted professionally and made reasonable professional attempts to reconcile all differences; that Colonel Britt was unresponsive and negative in manner; that Colonel Britt was not objective and made numerous statements reflecting a vindictive attitude ..."

Throughout the appellate proceedings Hill has labored under a cloud of suspicion that his conduct has been improper and that his affidavits are not credible, while his antagonists have been presumed to be honorable persons acting in the best interest of the federal government. The fact-finding authority, *i.e.*, the District Court, has specifically found otherwise.

4. District Court Misstatement. The District Court has never reached the point of entering factual findings regarding adequacy of procedure followed by the parties prior to court action, nor regarding Hill's entitlement to estoppel or tolling. The Court acknowledged Hill's notice to the EEOC of intent to sue, but held (Stay Appl. No. A-447, Appendix pp. 20-21),

> "[I]t appears that Plaintiff failed to exhaust the administrative prerequisites in a timely manner, as required by 29 U.S.C. § 622g."

As pointed out in Hill's motions for reconsideration, there is no section 622g of the referenced Code, and the portion of the ADEA applicable to federal employees is found at 29 U.S.C. § 633a.

CONCLUSION

It is indisputable that Hill's age was a significant factor in two federal personnel actions which adversely affected him. In the first, responsible agency officials sought to replace him with a younger employee, and further, took no action against unprotected employees for the same conduct for which Hill's removal was effected. The MSPB, in concert with the Air Force, refused to allow Hill to discover or to present evidence of discrimination, as required by law and its own regulations, for the reason that Hill could not show that the agency had replaced him with a younger employee prior to the time that replacement occurred. The position of the two agencies is reminiscent to that of Tweedle-Dee and Tweedle-Dum, two characters in the Lewis Carroll novel, *Through the Looking Glass*. One raises a ruckus over a bleeding finger, and when Alice notes that she cannot see any blood, the other explains that his finger has not yet been pricked.

The Court of Appeals for the Federal Circuit accepted the agency argument, effectively usurping the District Court's jurisdiction. When the matter came before the Tenth Circuit upon appeal of an injunction, that Court deferred to the record review, prejudging the evidence which could be found

by the District Court and subsequently sanctioning denial of *de novo* review.

While age discrimination may not appear to be the sole motive[16] for the firing action, the law codified at 5 U.S.C. § 7702 does not limit review to those instances where age discrimination is the only basis, but rather affords *de novo* review when "a basis for the action was discrimination" (emphasis added). Furthermore, the denial of *de novo* review to Plaintiff has occurred despite the clearest of indications by Congress and holdings by the Supreme Court that the results of administrative hearing cannot be given preclusive effect in subsequent litigation.

The MSPB decision has also been used to bar Hill's right under the ADEA to review of agency rejection of his application for a position for which he was judged highly qualified in favor of a "less senior" candidate. Worse yet, the sphere of preclusion has been expanded to bar Hill's statutory right of review under the Privacy Act of agency actions in maintaining inaccurate and untimely records which the District Court found to be (App. A - 7) [emphasis added],

> "motivated solely by a deliberate intention to prevent Plaintiff from obtaining employment with civilian agencies who deal in the defense industry where security clearances are essential."

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[16] In argument before the Tenth Circuit the Defendants indicated a willingness to concede reprisal motives as bases for the firing, so long as they are not regarded as age-discriminatory treatment. The concession of violation of the provisions of 5 U.S.C. § 2302 is quite a turnaround from Air Force arguments before the MSPB and the Federal Circuit, and Plaintiff should be entitled at a minimum to estoppel of such claim.

The bars have been applied even though the MSPB presiding official ruled at the beginning of the administrative hearing that "I will not allow appellant to present evidence on [discrimination] allegations" and later reemphasized the ruling,

> "The presiding official will not consider the suspension of appellant's security clearance, his failure to be selected for positions, the merits of his past disciplinary record, his allegations of discrimination, or the merits of his protected activities ..."

Petitioner submits that corrective action by the Supreme Court is now appropriate.[17]

Respectfully submitted,

THOMAS W. HILL
Petitioner, Pro Se

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[17] Hill's right to corrective action seems to be in keeping with the D.C. Circuit Court opinion in *Hill v. U.S. Air Force*, 795 F.2d 1067 (D.C. Cir. 1986), which disallowed Hill's Privacy Act claim for damages because of failure to show willful agency conduct regarding the maintenance of "personal notes" then at issue, but also held,

> "We note that nothing in our disposition of this case prevents appellant from seeking to have his official records corrected."

(3)

Supreme Court, U.S.
FILED
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No. 95-1498

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS W. HILL, PETITIONER

v.

DEPARTMENT OF THE AIR FORCE, ET AL.

ON PETITION FOR EXTRAORDINARY WRIT, AND IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was precluded from reexamining the determination of the Federal Circuit that petitioner's claim of age discrimination was frivolous.

2. Whether the Civil Service Reform Act of 1978 (CSRA) precluded the district court from adjudicating petitioner's claims under the Privacy Act.

3. Whether the CSRA precluded the district court's adjudication of petitioner's constitutional claims against the individual respondents.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11
Appendix A	1a
Appendix B	12a
Appendix C	21a
Appendix D	23a
Appendix E	29a

TABLE OF AUTHORITIES

Cases:

Astoria Fed. Sav. & Loan Ass'n v. *Solimino*, 501 U.S. 104 (1991)	7
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	3
Bush v. *Lucas*, 462 U.S. 367 (1983)	5, 9, 10
Chandler v. *Roudebush*, 425 U.S. 840 (1976)	7
Durfee v. *Duke*, 375 U.S. 106 (1963)	6
Hill v. *Department of the Air Force:*	
796 F.2d 1469 (Fed. Cir. 1986)	2, 3, 6, 7, 8
818 F.2d 874 (Fed. Cir. 1987)	3
844 F.2d 1407 (10th Cir.), cert. denied, 488 U.S. 825 (1988)	2
884 F.2d 1318 (10th Cir. 1989), cert. denied, 495 U.S. 947 (1990)	5
Houlihan v. *OPM*, 909 F.2d 383 (9th Cir. 1990)	9
Kean v. *Stone*, 926 F.2d 276 (3d Cir. 1991)	7, 8
Kleiman v. *Department of Energy*, 956 F.2d 335 (D.C. Cir. 1992)	9, 10
O'Connor v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996)	8

Cases—Continued: Page

Strang v. *United States Arms Control & Disarmament Agency*, 864 F.2d 859 (D.C. Cir. 1989) 9
United States v. *Fausto*, 484 U.S. 439 (1988) 8
Williams v. *Department of Army*, 715 F.2d 1485 (Fed. Cir. 1983) 3

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 3, 7
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 7
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 4
5 U.S.C. 7703(b)(1) 2
5 U.S.C. 7703(b)(2) 2
Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679 10
Privacy Act of 1974, 5 U.S.C. 552a 3
Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16:
5 U.S.C. 1221(e)(1) 10
5 U.S.C. 2302(b)(8) 10

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C3) is unreported. The opinions of the district court are also unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1995. A petition for rehearing was denied on December 14, 1995. Pet. App. D1-D2. The

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[1] The appendix to the petition does not include the relevant opinions of the district court. We have therefore included them in an appendix to this brief.

petition for a writ of certiorari was filed on March 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a), 1254(1).

STATEMENT

1. Petitioner was a civilian employee of the Air Force. Pet. 2; Pet. App. A2. In May, 1985, the Air Force served him with a notice of proposed removal from federal service based on his alleged misuse of government long distance telephone service and his unauthorized removal of records from the desk of a prior supervisor. Merit Systems Protection Board Initial Decision (MSPB Dec.) at 2 (Nov. 6, 1985). For the same reasons, the Air Force suspended petitioner's top secret security clearance. Pet. App. A1-A2. In July, 1985, petitioner's employment was terminated. MSPB Dec. at 2.

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). The MSPB determined that petitioner had engaged in the charged misconduct and that the misconduct related to his integrity and trustworthiness. *Hill* v. *Department of the Air Force*, 844 F.2d 1407, 1413 (10th Cir.), cert. denied, 488 U.S. 825 (1988). The MSPB also determined that petitioner's claim of age discrimination was frivolous. *Hill* v. *Department of the Air Force*, 796 F.2d 1469, 1471 n.2 (Fed. Cir. 1986). It therefore affirmed the agency's decision to remove petitioner from his position. MSPB Dec. at 24.

2. The Federal Circuit has exclusive jurisdiction over appeals from MSPB decisions that do not involve cases of discrimination, while federal district courts have jurisdiction over discrimination cases. 5 U.S.C. 7703(b)(1) and (b)(2). Under Federal Circuit precedent, "mixed cases" involving both discrimination and

other claims must be heard in federal district court. *Williams* v. *Department of Army*, 715 F.2d 1485 (1983).

Petitioner appealed the MSPB decision to the Federal Circuit, but then moved to have his appeal transferred to the United States District Court for the District of New Mexico, on the ground that it was a mixed case. The Federal Circuit denied the transfer. *Hill* v. *Department of the Air Force*, 796 F.2d 1469 (Fed. Cir. 1986). It held that the appeal was not a "mixed case," because petitioner had "alleged no set of facts which, if proven, would comprise even a minimum *prima facie* case of age discrimination." *Id.* at 1471. The Federal Circuit subsequently affirmed the MSPB's decision that petitioner had engaged in misconduct that justified his dismissal. *Hill* v. *Department of the Air Force*, 818 F.2d 874 (1987) (Table).

3. After the MSPB decision, but before the Federal Circuit's transfer decision, petitioner filed suit in the United States District Court for the District of New Mexico against the Air Force and two of his former military supervisors, respondents Paul S. Britt and Paul J. Vallerie. Petitioner alleged that the agency violated the Age Discrimination in Employment Act of 1967 and the Privacy Act of 1974; he asserted claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the individual respondents. All of the claims related to the government's actions in dismissing petitioner and suspending his security clearance

based on petitioner's misuse of long distance telephone service and unauthorized removal of records.[2]

The district court held that it was without jurisdiction to entertain petitioner's age discrimination claim. App., *infra*, 16a. The court noted that, in the course of determining jurisdiction, the Federal Circuit had examined whether petitioner had established a prima facie case of age discrimination, and found that he had not. *Id.* at 18a. Because the question of jurisdiction and the subsidiary question whether petitioner had stated a colorable claim of age discrimination were "actually litigated and necessarily determined by the Federal Circuit," the district court concluded that the Federal Circuit's determinations on those issues should be given "preclusive effect." *Id.* at 19a.

The court dismissed petitioner's request under the Privacy Act to amend his records on the ground that petitioner "failed to seek complete administrative relief as required by [5 U.S.C. 552a(d)(3)]." App., *infra*, 27a. After the government moved to dismiss petitioner's claim for damages under the Privacy Act on the ground that it was precluded by the Civil Service Reform Act of 1978 (CSRA), the district court dismissed that claim as well. Pet. 8; Pet. App. B1.

The court also dismissed petitioner's claim that respondent Vallerie violated petitioner's right to due process by maintaining illegal records of his performance. The court held that the CSRA provides the exclusive remedy for such conduct. App., *infra*, 2a-4a. The court declined to dismiss petitioner's claims that Britt disseminated false information that obstructed

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[2] Petitioner also asserted various other claims that are not at issue here.

his employment opportunities and engaged in illegal surveillance against him. The court concluded that the CSRA did not preclude those *Bivens* claims. *Id.* at 4a-8a.

4. The court of appeals reversed the district court's refusal to dismiss the *Bivens* claims against Britt. *Hill* v. *Department of the Air Force*, 884 F.2d 1318 (10th Cir. 1989), cert. denied, 495 U.S. 947 (1990). Relying on *Bush* v. *Lucas*, 462 U.S. 367 (1983), the court held that, because disseminating false information that interferes with job opportunities is a prohibited personnel practice under the CSRA, a *Bivens* claim for that conduct is precluded by that Act. 884 F.2d at 1320. The court concluded that petitioner's claim that Britt engaged in eavesdropping on petitioner's personal phone calls was also precluded by the CSRA, even though such conduct is not a prohibited personnel practice. The court reasoned that, under *Bush*, the CSRA precludes claims that implicate the employment relationship and that petitioner's firing was due in part to his personal phone calls. *Ibid.*

5. In a subsequent opinion, the court of appeals affirmed the district court's dismissal of petitioner's remaining claims. Pet. App. C1-C3. The court affirmed the district court's holding that it lacked jurisdiction of petitioner's claim of age discrimination "for substantially the reasons stated by the district court." *Id.* at C2. The court of appeals affirmed the district court's dismissal of petitioner's claim under the Privacy Act, because it involved a challenge to a personnel action, and the CSRA "provides an exclusive remedial scheme" for such claims. *Id.* at C3. Finally, the court of appeals affirmed the district court's dismissal of petitioner's constitutional claim

against Vallerie "for substantially the reasons set forth by the district court, as well as for the reasons set forth in *Hill*, 884 F.2d 1318." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the courts below erred in dismissing his claim of age discrimination. That contention is without merit.

In the course of deciding whether it had jurisdiction over petitioner's appeal from the MSPB decision, the Federal Circuit was required to decide whether petitioner had asserted a colorable claim of age discrimination. *Hill*, 796 F.2d at 1470. If petitioner had asserted a colorable age discrimination claim, the Federal Circuit would not have had jurisdiction over his appeal, since only district courts can entertain appeals involving both discrimination and other claims. *Ibid.* The Federal Circuit concluded that petitioner had not raised a nonfrivolous claim of discrimination, because he had "alleged no set of facts which, if proven, would comprise even a minimum *prima facie* case of age discrimination." *Id.* at 1471. It therefore concluded that it had exclusive jurisdiction over petitioner's appeal. *Ibid.*

The court below correctly held that petitioner could not relitigate in the district court the questions of jurisdiction and age discrimination decided by the Federal Circuit. Petitioner had a full and fair opportunity to litigate those issues in the Federal Circuit, and the Federal Circuit finally resolved those issues against petitioner. Under well-established principles, petitioner therefore was not free to relitigate those issues in the district court. *Durfee* v. *Duke*, 375 U.S. 106, 111-113 (1963) (a party may not relitigate an issue

that has been "fully and fairly litigated and finally decided" by another court).

Petitioner contends (Pet. 9-10) that the decision below gave preclusive effect to the MSPB's determination of no discrimination, and that it therefore conflicts with this Court's holdings in *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104 (1991), and *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), that administrative determinations are not binding in subsequent judicial proceedings under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. The court below, however, did not give preclusive effect to the MSPB's determination of no discrimination. It gave preclusive effect to the Federal Circuit's de novo determination that petitioner had failed to allege a colorable claim of discrimination. See *Hill*, 796 F.2d at 1471 ("After careful review of the record, we conclude that [petitioner] alleged no set of facts which, if proven, would comprise even a minimum *prima facie* case of age discrimination."); App., *infra*, 18a (Federal Circuit "in essence provided [petitioner] a *de novo* review of whether his allegations supported a *prima facie* showing"). There is therefore no conflict between the decision below and *Astoria* and *Chandler*.

Petitioner's contention (Pet. 11) that the decision below conflicts with *Kean* v. *Stone*, 926 F.2d 276 (3d Cir. 1991), is also incorrect. In *Kean*, the employee prevailed before the MSPB on his claim of discrimination in violation of Title VII, but appealed from what he considered to be an inadequate award of attorneys' fees. The sole question was whether the Federal Circuit or the district court had jurisdiction over that appeal. Viewing the employee's claim for attorneys' fees to be "part and parcel of the claim on

the merits," the Third Circuit held that the district court had jurisdiction. *Id.* at 287. *Kean* did not involve the question presented in this case—whether to give preclusive effect to a Federal Circuit determination that it has jurisdiction over an MSPB appeal because an employee has failed to assert a colorable claim of discrimination. *Kean* is therefore inapposite here.[3]

2. Petitioner contends (Pet. 12-14) that the courts below erred in dismissing his claim under the Privacy Act. That contention does not warrant review. The court of appeals determined that petitioner was attempting to use the Privacy Act to challenge a personnel practice prohibited by the CSRA. Pet. App. C2. The court of appeals concluded that the CSRA provides the exclusive remedy for such a claim.

This Court has observed that "[t]he CSRA established a comprehensive system for reviewing personnel action taken against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 455 (1988). The CSRA reflects Congress's judgment that, as a matter of "federal personnel policy," some remedies should be

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[3] Petitioner's contention in his supplemental filing that the decision below conflicts with *O'Connor* v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996), is also incorrect. In *O'Connor*, the Court held that a prima facie case of age discrimination can be established when an employee is replaced by a person in the protected class who is substantially younger. *Id.* at 1310. Nothing in that decision suggests that the court below should not have given preclusive effect to the Federal Circuit's determination that petitioner failed to assert a colorable claim of age discrimination. Indeed, as noted in Judge Newman's statement of additional views, petitioner failed to assert before the MSPB or the Federal Circuit that he was replaced by a younger person. *Hill*, 796 F.2d at 1473-1474.

available to some classes of employees for some violations of law, but that other remedies should be precluded. *Bush* v. *Lucas*, 462 U.S. at 380-381. The court of appeals' holding that an employee may not assert a Privacy Act claim to challenge a personnel practice prohibited by the CSRA is consistent with those observations.

The decision below is also consistent with the Ninth Circuit's decision in *Houlihan* v. *OPM*, 909 F.2d 383 (1990). There, the court held that an employee may not assert a claim under the Privacy Act that would require the court to determine the merits of a personnel decision. *Id.* at 384-385. The court reasoned that permitting such a claim "'would open the back door to judicial review to perhaps an overwhelming number' of CSRA claims," and would be "squarely at odds with the CSRA's statutory scheme." *Id.* at 385.

In *Kleiman* v. *Department of Energy*, 956 F.2d 335 (1992), the D.C. Circuit reached the same conclusion. There, the court held that employees may not assert claims under the Privacy Act that amount to "a collateral attack" on a personnel decision, bypassing the "exhaustive remedial scheme" established by Congress under the CSRA. *Id.* at 338.

Petitioner asserts (Pet. 12-13) that the decision below conflicts with *Strang* v. *United States Arms Control & Disarmament Agency*, 864 F.2d 859 (D.C. Cir. 1989). In *Strang*, an employee sought relief under the Privacy Act to expunge agency records stating that she failed to obtain the necessary clearances before giving Japanese officials a document containing sensitive national security information. The D.C. Circuit held that the district court had erred in granting summary judgment on that claim. *Id.* at 865-

867. That decision did not address the relationship between the Privacy Act and the CSRA. As noted above, the D.C. Circuit has since made clear that an employee may not rely on the Privacy Act to challenge a personnel practice prohibited by the CSRA. *Kleiman*, 956 F.2d at 338.

3. Finally, petitioner contends (Pet. 14-15) that the courts below erred in dismissing his *Bivens* claims against Britt and Vallerie. In *Bush* v. *Lucas*, *supra*, however, the Court held that, because the CSRA provides a comprehensive remedy for impermissible personnel actions, a federal employee may not assert a *Bivens* claim against a supervisor for constitutional violations arising out of the employment relationship. 462 U.S. at 388-390. That holding is controlling here.

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679, and the Whistleblower Protection Act of 1989, 5 U.S.C. 1221(e)(1), 2302(b)(8), relied upon by petitioner, do not have any bearing on petitioner's constitutional claims against Britt and Vallerie. The Westfall Act makes the government exclusively liable for the common law torts its employees commit in the course of employment. 28 U.S.C. 2679. The Whistleblower Act provides that an employee may seek corrective action from the MSPB for personnel actions against the employee resulting from disclosure of governmental misconduct. 5 U.S.C. 1221(e)(1), 2302(b)(8). Neither Act provides a remedy against a supervisor in his individual capacity for constitutional violations arising out of the employment relationship.

CONCLUSION

The petition for extraordinary relief and in the alternative for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1996

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, AND
PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 21, 1987]

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants' motions to dismiss, or, in the alternative, for summary judgment on Counts I and V of Plaintiff's Second Amended Complaint. The Court, having reviewed the pleadings, the evidence of record and the relevant law, and treating these as motions for summary judgment, finds that Defendants' motions should be granted in part and denied in part. To the extent that Plaintiff seeks to state a claim under the Federal Tort Claims Act, that claim will be dismissed. Plaintiff's motion to amend his Complaint to add David Hickman as Defendant will also be denied.

Defendants Paul J. Vallerie and Paul S. Britt seek dismissal or summary judgment of the claims alleged against them in Counts I and V respectively of Plaintiff's Second Amended Complaint. Both of these Defendants are Air Force employees who served as directors of Aerospace Studies and were Plaintiff's second level supervisors during the time he was employed at Kirtland Air Force Base in Albuquerque, New Mexico.

Claims against Defendant Vallerie

Plaintiff seeks damages against Defendant Vallerie in his individual capacity for violations of Plaintiff's due process rights based on Defendant Vallerie's "actions in maintaining . . . illegal records on Plaintiff's performance and conduct and his use of them to deny Plaintiff deserved employment benefits and promotion opportunities . . . ." Second Amended Complaint, First Cause of Action, ¶ 1. These records, maintained without Plaintiff's knowledge, are described as "copies of letters sent to Plaintiff's first level supervisor, directing him to take punitive actions against the Plaintiff, and also included copies of letters sent to other agency officials. *Id.*, Facts Relevant To Causes of Action, ¶ 2. They were disclosed to Defendant Britt, Vallerie's successor in office.[1]

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[1] These same records were later the subject of a request of access by Plaintiff under the Freedom of Information and Privacy Acts. The request was denied at the agency level, because they were characterized as Vallerie's "personal notes." This finding was affirmed by the United States District Court for the District of Columbia (Civ. No. 84-1952, June 26, 1985), and then by the United States Court of Appeals for the D.C. Circuit (No. 85-5805).

In many situations, damage suits will lie against federal officials for violation of one's constitutional rights pursuant to the teachings of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A judicially created damage remedy for violation of constitutional rights by federal officials is not universally available, however. In *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held that petitioner, who claimed he had been demoted from his civil service position in retaliation for his having exercised his first amendment rights, had no *Bivens*-type cause of action for damages. As petitioner's claims arose out of an employment relationship with the United States governed by "comprehensive procedural and substantive provisions giving meaningful remedies," the Court found the statutory scheme to be "a special factor counselling hesitation" and declined to fashion a separate nonstatutory damages remedy. *See id.* at 378. The statutory remedies need not be fully comprehensive or even as effective as an individual damages remedy. The Court's decision that no independent cause of action would lie was dependent on the comprehensive nature of the remedial scheme created by Congress. In deferring to the congressional scheme in such an instance, the Court limited its holding to claims of unconstitutional conduct involving personnel actions covered by this system. *Id.* at 385 n. 28; *see also* the concurring opinion of Marshall, J., *id.* at 390-91.

As to Plaintiff's due process claims against Defendant Vallerie, the evidence shows that administrative grievance procedures were in effect for resolving disputes over records maintenance not otherwise under the jurisdiction of the Privacy Act, 5 U.S.C. § 552a and that Plaintiff periodically availed

himself of those procedures. *See* Declaration of Pat H. Chrisman, ¶ 3. The Court thus concludes that Plaintiff's due process claims based upon Vallerie's maintenance and use of these "illegal" records are adequately redressable by a comprehensive statutory scheme that would preclude a *Bivens*-type damage remedy. *See also Philippus v. Griffin*, 759 F.2d 806 (10th Cir. 1985); *Vest v. United States Department of the Interior*, 729 F.2d 1284 (10th Cir. 1984); *Dynes v. Army Air Force Exchange Service*, 720 F.2d 1495 (11th Cir. 1983). Therefore, Plaintiff's second cause of action against Defendant Vallerie in his individual capacity will be dismissed.

Claims against Defendant Britt

As stated in Plaintiff's fifth cause of action, Defendant Britt, "in taking the actions which have resulted in the suspension of Plaintiff's security clearance" "willfully disseminated allegations which he knows to be false and injurious to Plaintiff's reputation, and have been designed to obstruct Plaintiff's employment opportunities." Plaintiff specifically alleges that Britt took action to remove Plaintiff's name from the list of eligibles for a position at the USAF Space Division. Defendant Britt "also personally acted to cause illegal takings of Plaintiff's personal conversations and has wantonly disseminated information to which Plaintiff has rights to privacy." Second Amended Complaint, Fifth Cause of Action, ¶¶ 1, 5. Such actions are said to have resulted in denial of due process to Plaintiff for which Plaintiff seeks damages against Defendant Britt in his individual capacity.

Plaintiff acknowledges in his Complaint that the employment obstruction actions alleged "directly

violate the provisions of 5 U.S.C. § 2302(b)(4)." Complaint, Fifth Cause of Action, ¶ 3. This section describes prohibited personnel practices applicable to "any [federal] employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment." As a "prohibited personnel practice," a person having such a grievance may direct it to the Office of Special Counsel ["OSC"], pursuant to 5 U.S.C. § 1026. The OSC has the authority to investigate the allegations and may, in his discretion, petition the Merit Systems Protection Board ["MSPB"] for "corrective action" against agencies or employees engaged in the prohibited practice. A decision to settle or not to pursue his claims with the OSC who declined to bring Plaintiff's claims to the attention of the MSPB.

Defendant argues that under the teachings of *Bush v. Lucas*, *supra*, Plaintiff is limited to his statutorily created remedies and that the existence of such a scheme is a special factor counseling hesitation in recognizing a separate constitutional cause of action. This Court disagrees.

Assuming for the moment that Plaintiff's allegations that Defendant Britt disseminated false information resulting in injury to Plaintiff's reputation and obstructed his employment opportunities can be substantiated, such allegations would implicate a liberty interest deserving of due process protections. *See Board of Regents v. Roth*, 408 U.S. 564, 573 (1972);

Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985); *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985).[2]

The courts have reached differing conclusions on the issue of whether the Plaintiff's recourse to the OSC provides an adequate remedy under *Bush v. Lucas*. However, in an exhaustive consideration of the issue, the United States Court of Appeals for the District of Columbia Circuit ruled that where the alternative remedy is not judicially reviewable, it is not adequate under *Bush* and would not preclude a constitutionally based cause of action. *See Spagnola v. Mathis*, 809 F.2d 16 (D.C. Cir. 1986); *see also Kotaski v. Cooper*, 799 F.2d 1342, 1348-49 (9th Cir. 1986); *Egger v. Phillips*, 710 F.2d 292, 298 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983); *Pope v. Bond*, 613 F. Supp. 708, 715 (D.D.C. 1985); *Nietert v. Kelley*, 582 F. Supp. 1536, 1537 (D. Colo. 1984). *But see Pinar v. Dole*, 741 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *Hallock v. Moses*, 731 F.2d 754, 757 (11th Cir. 1984); *Watson v. United States Department of Housing & Urban Development*, 576 F. Supp. 580, 586 (N.D. Ill. 1983); *Cazales v. United States Department of Justice*, 569 F. Supp. 213, 229 (E.D. La. 1983), *aff'd*, 731 F.2d 280 (5th Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985).

While the Supreme Court in *Bush* gave little guidance regarding precisely what is required to make a remedy adequate, it is noteworthy that the Plaintiff in *Bush* had a right to judicial review of his claims. This Court sides with the *Spagnola* court in questioning whether judicial review can be totally pre-

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[2] Whether or not the procedures supplied to Plaintiff in this case satisfied the requirements of due process is not now before the Court.

cluded when constitutional rights are at stake. 809 F.2d at 28. *See also Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Thus, this Court declines to dismiss Plaintiff's due process claim against Defendant Britt in his individual capacity involving obstruction of Plaintiff's employment opportunities.

As to the other matter alleged by Plaintiff against Defendant Britt, in which he claims Britt's use of illegal surveillance against him, Plaintiff properly suggests that Britt's actions were something other than "personnel actions" within the purview of any statutory scheme. In his brief, he accuses Defendant Britt of "Gestapo-type tactics involving illegal surveillance and unwarranted takings." Combined Response to Defendants' Motions to Dismiss, or to Grant Summary Judgment Regarding Counts I and V, p. 6. The evidence presented by Plaintiff suggests that Col. Britt was involved in monitoring of Plaintiff's telephone conversations at his place of employment and in recruiting others to do the same.

To the extent that such actions interfere with Plaintiff's legitimate expectation of privacy, Plaintiff had pled an independent constitutional violation that would not be redressable under the civil sentence statutory scheme and therefore not barred by the *Bush v. Lucas* rationale. "[C]ertain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme." *See Bush*, 462 U.S. at 385 n. 28; *see also id.* at 391 (Marshall, J., concurring).

Such an injury is not redressable by the statutory scheme as it is not a "personnel action" under 5 U.S.C. § 7502 or 5 U.S.C. § 2302. The only forum available for redress of such an inquiry would be the district court. While the Defendant points out that testimony regarding these matters was adduced at the proceedings of the Merit Systems Protection Board, no determination was made as to whether the alleged surveillance activities were contrary to law. Since these were not strictly "personnel actions," the administrative scheme did not provide a direct remedy. Even if the removal action was upheld on legitimate grounds, Plaintiff may still seek redress for this type of independent constitutional violation.

The Court thus finds that genuine issues of material fact exist as to whether Defendant Britt's actions infringed on Plaintiff's legitimate expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967). There remain questions of fact on these issues that preclude summary judgment on this aspect of Plaintiff's claims against Defendant Britt.

Common Law claims

To the extent that Plaintiff's Complaint attempts to state a common law cause of action against these Defendants, such as one for defamation, the Court would agree with the Defendants that such an action would be barred by the *Barr v. Matteo* doctrine. In *Barr*, 360 U.S. 564 (1959), the Supreme Court held that federal officials are entitled to absolute immunity for common law torts where the defendants' actions constituted an appropriate exercise of discretion "within the outer perimeter of their duties." *Id.* at 575. This standard has been liberally applied so as to allow federal officials the freedom to perform their

duties unfettered by the threat of lawsuits which might diminish the effectiveness of governmental administration. *Id.* at 571.

Based on the evidence submitted, the Court finds that in reporting, investigating and proposing actions concerning Plaintiff's access to classified information and his removal from federal service, both Defendants were acting within the scope of their responsibility as Plaintiff's supervisors. *See Williams v. Collins*, 728 F.2d 721, 727 (5th Cir. 1984). As such, Defendants' actions were highly discretionary acts that would further the policies underlying the official immunity doctrine. *See Strothman v. Gefreh*, 739 F.2d 515, 518 (10th Cir. 1984). Even an allegation of malice will not defeat immunity where the action itself was within the scope of Defendants' employment. *Barr*, 360 U.S. at 575.

Federal Tort Claims Act claims

Next, the Court considers whether Plaintiff has stated a claim against Defendants Vallerie and Britt under the Federal Tort Claims Act ["FTCA"], 28 U.S.C. § 1346. Plaintiff filed with this Court a "Notice of Intent Regarding Federal Tort Claims Cause" asking the Court to construe his Second Amended Complaint as encompassing such a claim. Defendants move to dismiss any such claim on several grounds. First, Plaintiff has failed to name the United States as a defendant. The United States is the only proper defendant under such a claim. 28 U.S.C. § 2674. Nor is the correspondence submitted by the Plaintiff adequate to fulfill the requirement that Plaintiff file an administrative claim to the federal agency, clearly stating the total damages claimed. *See* 28 U.S.C. § 2675. This requirement is

jurisdictional and may not be waived. *Three-M Enterprises, Inc. v. United States*, 548 F.2d 293 (10th Cir. 1977). Furthermore, the only common law tort to which Plaintiff makes reference in his "Objection to Defendants' Motion to Dismiss Any Claim Under the FTCA" is slander, for which the FTCA does not waive immunity. 28 U.S.C. § 2630(h). Furthermore, Plaintiff's due process claims may not be the subject of an FTCA action. For all these reasons, the Court declines to find that Plaintiff has stated any claim under the FTCA and will grant Defendants' motion to dismiss.

Motion to Amend Complaint

Plaintiff has recently moved to amend his Second Amended Complaint to add David Hickman as a defendant. The Court finds this motion to be untimely, as the case is now preparing for trial. Accordingly, the motion to amend will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' motions to dismiss, or, in the alternative, for summary judgment on Counts I and V and of Plaintiff's Second Amended Complaint, be, and the same hereby are:

1. granted as to Defendant Vallerie in his individual capacity; and

2. denied as to Defendant Britt on the constitutional claims, but granted as to the common law and Federal Tort Claims Act claims.

IT IS FURTHER ORDERED that Plaintiff's motion to amend complaint to add David Hickman as a defendant be, and the same hereby is, denied.

DATED this 18th day of September, 1987.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 4, 1987]

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants' motion to dismiss Plaintiff's sixth cause of action. The Court, having reviewed the pleadings, the evidence of record and the relevant law, finds that the motion is well taken and will be granted. Also, the Court finds that the motion of Defendant Merit Systems Protection Board ["MSPB" or "the Board"] to be dismissed from the action is well taken and should be granted. Lastly, the Court finds that no other claim sounding in age discrimination is fairly before the Court, so Defendants' motion to dismiss any claim by Plaintiff which alleges discrimination in relation to the removal of Plaintiff's name from a list

of eligible candidates for a job with Space Division will be granted.

Plaintiff, appearing *pro se*, filed a Complaint in this Court, stemming from his removal from federal service and his suspension of access to classified materials. The procedural background of this case is truly a tangled web but will be summarized to the extent that it bears relation to Plaintiff's sixth cause of action. In that claim, Plaintiff seeks review of a decision by the MSPB affirming his removal from federal employment and seeks *de novo* review of his allegations that his removal was based in part on discrimination on the basis of age.

After having pursued relief from the agency decisions within the agency itself, Plaintiff invoked the Board's jurisdiction to review his removal from employment, as well as his suspension of access to classified materials. In his appeal petition to the Board, he made reference to possible age discrimination without providing any details.[1] The Board is empowered to hear removal actions involving issues of age discrimination, pursuant to 5 U.S.C. § 7702(a)(1)(B)(iv), although a plaintiff need not pursue an administrative resolution and may directly file suit in district court as provided by 29 U.S.C. § 622(a). *See Doyal v. Marsh*, 777 F.2d 1526, 1535 (11th Cir. 1985). Consistent with regulation 5 C.F.R. § 1201.153(a)(1), the burden is on the appellant to state in his petition "that there was discrimination in conjunction with the matter appealed and provide specific examples of how the appellant was discrimi-

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[1] He also made allegations of discrimination on the basis of marital status, and an unspecified handicap, but these issues are not currently before the Court.

nated against." The Board gave plaintiff an opportunity to submit supporting evidence for his claims but ultimately concluded that appellant had failed to raise nonfrivolous allegations of discrimination. The Board also upheld Plaintiff's removal from federal service.

The Civil Service Reform Act of 1978 generally provides that final decisions of the MSPPB are reviewable in the Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1). In such cases, the court may set aside an agency action only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, procedurally infirm, or unsupported by substantial evidence. *Id.* § 7703(c). The Act, however, creates an exception for "[c]ases of discrimination." *Id.* § 7703(b)(2). Such cases include those in which the employee "alleges that a basis for the action was discrimination prohibited by, *inter alia*, the Age Discrimination in Employment Act, 29 U.S.C. § 622(a)(c). These cases are reviewable *de novo* by the district court. *Id.* § 7703(c). *See Chandler v. Poudebush*, 425 U.S. 840 (1976).

The language of § 7703 has been interpreted as disallowing bifurcation of an appeal, even where a discrimination issue is alleged as a possible basis for removal. The accepted practice is to appeal a "mixed case," that is, one involving issues of removal plus discrimination, to a district court which then has jurisdiction over all the issues decided by the MSPB. *See Christo v. Merit Systems Protection Board*, 667 F.2d 882 (10th Cir. 1981). Where there are no discrimination issues, or the discriminatory issues have "dropped out" or been abandoned, jurisdiction over the appeal is exclusive with the United States Court of Appeals for the Federal Circuit. *Meehan v. United States Postal Service*, 718 F.2d 1069 (Fed. Cir. 1983);

Williams v. Department of the Army, 715 F.2d 1485 (Fed. Cir. 1983).

In Plaintiff's case, the Board issued its final decision on December 11, 1985, upholding the Plaintiff's removal from service. Plaintiff was instructed that he could appeal the Board's decision within 30 days to the United States of Appeals for the Federal Circuit "if the Court has jurisdiction," per 5 U.S.C. § 7703(b)(1). Plaintiff did take his appeal to the Federal Circuit. Subsequently, however, Plaintiff moved that Court to transfer his appeal to the United States District Court in New Mexico on the ground that because his was a case involving age discrimination, jurisdiction over the entire appeal was exclusive with the district court.

In *Hill v. Department of the Air Force*, 796 F.2d 1469 (Fed. Cir. 1986), the Federal Circuit denied Plaintiff's motion to transfer, holding that it was not a "mixed case" that would entitle Plaintiff to seek review in the district court. The court, fearing possible circumvention of its jurisdiction "by the mere mention of discrimination in a petition for review," held that where the appellant had not raised a nonfrivolous allegation of discrimination, it was not a "mixed case" and therefore jurisdiction was proper in the Court of Appeals, pursuant to 5 U.S.C. § 7703(b)(1). *Id.* at 1471. In a later unpublished decision, the Federal Circuit affirmed the MSPB decision in its entirety.

The question now before the Court is whether this Court has jurisdiction over any of Plaintiff's fourth and sixth causes of action. As to the issues regarding Plaintiff's security clearance contained in the fourth cause of action, these matters were not addressed by the Board or the Federal Circuit, and this Court

asserts its jurisdiction over them as explained in its entry of a preliminary injunction on September 18, 1986, restoring his security clearance, and in its Memorandum Opinion and Order of August 21, 1987, clarifying the basis for the Court's jurisdiction following remand by the Tenth Circuit. The Court, however, will stay a ruling on the merits of the security clearance issues pending decision on the matter which is currently before the Tenth Circuit on appeal of the preliminary injunction.

Regarding review of the MSPB decision and the age discrimination issue, however, the Court finds it is without jurisdiction to entertain these claims. Underlying this determination is the question of how much deference this Court should accord the decision of the Federal Circuit regarding its own jurisdiction. The Government argues that the Federal Circuit's decisions, both on the merits of the appeal and the court's jurisdiction, should be given precedential, if not *res judicata*, effect by this Court.

Had the appeal been lodged originally in this Court, it is not inconceivable that this Court would have considered it a "mixed case" and proceeded with review accordingly, including *de novo* review of Plaintiff's allegations of age discrimination. However, the Court is faced with the *fait accompli* that the Federal Circuit has already reviewed and affirmed the matter on the merits and has articulated a standard for determining whether jurisdiction has been established as a threshold matter.

It is axiomatic that courts have jurisdiction to determine their own jurisdiction. Thus, the question posed to this Court is whether the Court need give full effect to the Federal Circuit's determination of a question of law regarding its own jurisdiction or

whether it is subject to collateral attack or relitigation in this Court. The legal and policy concerns involved in this issue are addressed at length in 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4428 (1981) and in Restatement (Second) of Judgments § 12 (1981). Consistent with the Supreme Court's rulings in *Durfee v. Duke*, 375 U.S. 106 (1963), and *Stoll v. Gottlieb*, 305 U.S. 165 (1938), much deference is afforded to the decision of the first court, when the question of jurisdiction has "been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Id.* at 111. The modern view, as reflected in Restatement (Second) of Judgments § 12 is to recognize certain limited exceptions to the general principle of full faith and credit of another court whose jurisdiction is questioned.

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:
>
> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness

> the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

In applying these factors to the case at bar, this Court believes that the parties clearly had a full opportunity to litigate the jurisdiction issue in the Federal Circuit. Furthermore, the issue was finally appealable to the Supreme Court. This Court believes that the question of whether Plaintiff's appeal was "mixed case" was a close one and was not "plainly beyond" the Federal Circuit's jurisdiction. This Court acknowledges that manipulation of jurisdiction by making unsupported allegations is of legitimate concern, though one result of the Federal Circuit's decision is to limit the district court's own jurisdiction to hear discrimination issues *de novo*. However, the Federal Circuit has tried to strike a balance by requiring Plaintiff to make a minimum showing supporting his claim of discrimination. Requiring Plaintiff to make a threshold showing is not fundamentally unfair and is consistent with MSPB regulations. In reviewing the basis for its jurisdiction, the Federal Circuit is essence provided Plaintiff a *de novo* review of whether his allegations supported a *prima facie* showing and found they did not.

The Court is not totally comfortable with the Federal Circuit's decision to assume exclusive jurisdiction over the appeal. However, the Court finds that the discretionary and equitable factors weigh in favor of deferring to the Federal Circuit's findings regarding its jurisdiction over the matter of Plaintiff's appeal from the decision of the MSPB. The

result of such deference is the dismissal of Plaintiff's age discrimination claim in this forum.

Even were this Court to review Plaintiff's age discrimination claim *de novo*, Plaintiff has again stated in his Complaint totally conclusory allegations regarding this claim. Futhermore, it appears that Plaintiff failed to exhaust the administrative prerequisites in a timely manner, as required by 29 U.S.C. § 622g. As the matter was actually litigated and necessarily determined by the Federal Circuit, this Court finds that it is not inequitable to give preclusive effect to the finding that jurisdiction over Plaintiff's appeal lies with the Federal Circuit and that Plaintiff failed to state a colorable claim of age discrimination sufficient to have his action heard by the district court.

On this basis, therefore, the Court determines that it has no jurisdiction to review the MSPB decision or to take jurisdiction over Plaintiff's age discrimination claim. As there are no remaining claims against the MSPB, it will be dismissed as a Defendant in this action.

Lastly, as collateral matter, Defendants ask this Court to disallow any additional claims of age discrimination related to the removal of Plaintiff's name from a list of eligible candidates for a job with Space Division. The Court agrees that any such claim has not been fairly pled as one seeking relief under the ADEA, but is rather pled as a "prohibited personnel practice" under 5 U.S.C. § 2302 that was properly consolidated in his appeal to the MSPB. This finding is further substantiated by the fact that Plaintiff's notice of suit to the EEOC may not fairly be read as containing any claim having to do with removal of his name on the basis of age. Therefore,

any such claim is subject to dismissal. An appropriate order will be entered herewith.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 3, 1987]

ORDER

THIS MATTER having come on for consideration on Defendants' motion to dismiss Plaintiff's sixth cause of action, and the Court having granted dismissal of the sixth cause of action;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's sixth cause of action, seeking judicial review of the MSPB decision of December 11, 1985, is hereby dismissed.

IT IS FURTHER ORDERED that Plaintiff's claims of age discrimination are hereby dismissed.

IT IS FURTHER ORDERED that Defendant MSPB is hereby dismissed as a Defendant in this action.

DATED this 3rd day of September, 1987.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 4, 1987]

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant Air Force's motion to dismiss or for summary judgment on the second cause of action contained in Plaintiff's Second Amended Complaint. The Court, having reviewed the pleadings, the evidence of record and the relevant law, finds that the motion will be granted in part and denied in part.

In his second cause of action, Plaintiff seeks "judicial review" under the Privacy Act, 5 U.S.C. § 552a, of the Air Force's refusal to amend records pertaining to his employment with the Air Force. Second Amended Complaint, Second Cause of Action,

¶ 5. Plaintiff also requests "an award of damages because of agency failure to maintain his records with accuracy, relevance, timeliness, and completeness as was necessary to assure fairness in determinations of awards and other deserved benefits." *Id.* ¶ 6. Defendant Air Force moves to dismiss the second cause of action in its entirety, asserting that Plaintiff has failed to exhaust his administrative remedies.

By letter dated April 5, 1985, Plaintiff formally requested that the agency amend his AF Form 971 records in accordance with the provisions of the Privacy Act and Air Force Regulation 12-35. The letter was acknowledged within the ten-day time-frame required by the Act, 5 U.S.C. § 552a(d)(2), and requested that Plaintiff supply specifics regarding the records to be amended. Plaintiff sent his reply on May 3, 1985. By letter dated June 17, 1985, Pat H. Chrisman, local system manager for the records at issue, responded to Plaintiff's follow-up letter, indicating that Plaintiff's request was being forwarded to another department "for review and further guidance" because the "request appears to ask to amend information which is subjective in nature and therefore should not be processed as a Privacy Act request . . . ." Plaintiff subsequently received a letter dated August 13, 1985, from William H. Lewis, denying Plaintiff's request on the basis that the records in question are "in compliance" with the Privacy Act's requirements of "accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual . . . ." Plaintiff was informed that should he decide to appeal this decision he must make a request for Secretarial review within sixty days from receipt of this denial letter. Plaintiff did not pursue an appeal. Instead,

Plaintiff sought relief in this court as described above.

The Privacy Act specifically authorizes civil relief. Title 5 U.S.C. § 552a(g)(1) states in relevant part:

> **(g)(1) Civil remedies.** —Whenever any agency
>
> (A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
>
> . . . ;
>
> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
>
> (D) fails to comply with any provisions of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Subsection (d)(3), referred to in paragraph A above, requires that "each agency that maintains a system of records shall—

> permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section . . . .

Defendant seeks to dismiss Plaintiff's cause of action under the Privacy Act on the basis that Plaintiff failed to comply with the administrative prerequisites contained in this subsection.

Plaintiff argues that his Complaint presents two distinct claims for relief under the Privacy Act; the first, seeking review of the agency's refusal to amend the designated records under 5 U.S.C. § 552a(g)(1)(A) and the second, seeking damages for Defendant's willful failure to maintain Plaintiff's records with the requisite "accuracy, relevance, timeliness and completeness as is necessary to assure fairness," as provided at § 552a(g)(1)(C).

While Plaintiff's Complaint is not a model of specificity, the Court agrees that Plaintiff's second cause of action states a claim requesting both equitable relief (amendment of records) and damages. Claims seeking amendment of records under subsection (g)(1) require that a claimant exhaust his administrative remedies, as outlined at subsection (d)(3), *supra*, before bringing a civil suit to compel amendment. *See Hill v. United States Air Force*, 795 F.2d 1067, 1069 (D.C. Cir. 1986); *Nagel v. United States Department of Health, Education & Welfare*, 725 F.2d 1438, 1441 (D.C. Cir. 1984). Plaintiff failed to seek complete administrative relief as required by subsection (d)(3). Plaintiff has failed to make even a preliminary showing why this requirement should be waived in this case. Therefore, his claim seeking amendment is not ripe for review by this Court and must be dismissed.

As to Plaintiff's suit for damages, under subsection (g)(1)(3), however, there is no requirement that a plaintiff exhaust his administrative remedies. *See Hill*, 795 F.2d at 1069-70; *Nagel*, 725 F.2d at 1441 n. 2. Defendant, however, alternatively seeks dismissal on the ground that Plaintiff has failed to satisfy the further condition of such a claim that he show he has suffered adverse consequences caused by the unfair record. Plaintiff does, however, allege to have suffered "in determinations of awards and other deserved benefits." While Plaintiff admittedly failed to provide specific details, Defendant could have sought to remedy this deficiency by seeking a motion for a more definite statement, pursuant to Fed. R. Civ. P. 12e. Furthermore, as Defendant did not raise this issue until its reply brief, Plaintiff did not have the burden of coming forward with relevant evidence on

this point. Likewise, the requirement tha[t] Plaintiff prove that the Defendant agency acted "in [a] manner which was intentional or willful," as re[quired by § 552a(g)(4), was not challenged by Defen[dant in a timely manner. Plaintiff did present some[evidence suggesting that he attempted to seek inform[al agency action without success, thereby raising a q[uestion of fact regarding the intent or willfulness of t[he agency conduct. As Defendant has not met its [burden on summary judgment to show it is entitled to[judgment as a matter of law on Plaintiff's claim for[damages, summary judgment on this claim will be d[enied. An appropriate order shall be entered herewith[.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, AND PAUL J. VALLERIE, DEFENDANTS

[Filed Sept. 4, 1987]

ORDER

THIS MATTER having come on for consideration on Defendant Air Forces' motion to dismiss or for summary judgment on the second cause of action contained in Plaintiff's Second Amended Complaint;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's motion to dismiss Plaintiff's second cause of action is granted as to Plaintiff's request for amendment of records, but denied as to Plaintiff's claim for damages.

DATED this 3rd day of September, 1987.

/s/ JUAN G. BURCIAGA
JUAN G. BURCIAGA
United States District Judge

Supreme Court, U.S.
FILED
JUL 2 1996
CLERK

No. 95-1498

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. HILL,

Petitioner,

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,

Respondents.

On Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

THOMAS W. HILL,
Petitioner, Pro Se
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TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations ii

I. Respondents Have Misstated Facts Regarding Hill's Federal Circuit Appeal And Have Not Assessed The Scope Of That Review Against ADEA Requirements 1

II. The Argument That Federal Employee Privacy Act Claims Are Foreclosed By Construction With The CSRA Is Opposed By Texts Of Controlling Statutes 5

III. Supreme Court Decisions Support Claims Against Federal Employees For Fourth Amendment Torts 9

Conclusion 10

APPENDIX E - Final Decision of the Court of Appeals for the Federal Circuit, MSPB Docket No. DE07528510204, Hill v. Department of the Air Force. Decided February 10, 1987 ..... E-1

TABLE OF CITATIONS

Cases Cited	Page
Astoria F.S. & L. Ass'n. v. Solimino, 501 U.S. 104 (1991)	4
Brewer v. U.S. Postal Service, 647 F.2d 1093, 1096 (Fed.Cir. 1981), *cert. denied*, 454 U.S. 1141 (1982)	3
Bush v. Lucas, 462 U.S. 367 (1983)	7, 9
Chandler v. Roudebush, 425 U.S. 840 (1976)	4
Dept. of Navy v. Egan, 108 S.Ct. 818 (1988)	8
Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984)	3
Hill v. Dept. of Air Force, 796 F.2d 1469 (Fed.Cir. 1986)	3
Hill v. Dept. of Air Force, 884 F.2d 1318 (10th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990)	10
Hubbard v. U.S. EPA, 809 F.2d 1 (D.C.Cir. 1986), *aff'd in part on other grounds sub. nom. Spagnola v. Mathis*, 859 F.2d 223 (D.C.Cir. 1988) (en banc)	8
Kleiman v. Dept. of Energy, 956 F.2d 335 (1992)	7
McGregor v. Greer, 748 F.Supp. 881 (D.D.C. 1990)	10

Nabors v. United States, 568 F.2d 657, 669 (9th Cir. 1978) 3

O'Connor v. Consolidated Coin Caterers, Inc., 116 S.Ct. 1307 (1 April 1996) 4

O'Connor v. Ortega, 107 S.Ct. 1492 (1987) 9

Pilon v. U.S. Dept. of Justice, 73 F.3d 1111 (D.C. Cir. 1996) 8

Rivera v. U.S., 924 F.2d 948, 954 (9th Cir. 1991) .. 6

Schowengerdt v. General Dynamics Corp. 823 F.2d 1328, 1339 (9th Cir. 1987) 10

Siegert v. Gilley, 500 US 226, 231 (1991) 9

Stevens v. Dept. of Treasury, 500 U.S. 1 (1991) 4

Strang v. U.S. Arms Control & Disarmament Agency, 864 F.2d 859 (D.C. Cir. 1989) 7

United States v. Fausto, 484 U.S. 439 (1988) 7

Other

Civil Service Reform Act of 1978, *As Amended* ..... passim

Age Discrimination in Employment Act 3

Privacy Act of 1974, *As Amended* ..... passim

Public Law 101-12: 5 U.S.C. § 1222 6

135 Cong.Rec. S2782-83 (daily ed. Mar. 16, 1989) . 7

I. Respondents Have Misstated Facts Regarding Hill's Federal Circuit Appeal And Have Not Assessed The Scope Of That Review Against ADEA Requirements.

Respondents have not challenged the accuracy of Hill's evidence showing that the agency waited until the Merit Systems Protection Board (MSPB) had upheld the firing of Hill to fill his position with a younger employee. Neither have they denied that an open position at Space Division for which Hill judged was well-qualified was used to hire a person "less senior" than Hill, in accordance with desires of management.[1] Respondents have instead relied on the claim that Hill had a "full and fair opportunity to litigate those issues in the Federal Circuit" and "therefore was not free to relitigate those issues in the district court." Opp. Brief, p. 6 (emphasis added). They conclude with the allegation (*Id.* n.3) that "petitioner failed to assert before the MSPB or the Federal Circuit that he was replaced by a younger person."

The latter allegation is simply false, as shown by a file-stamped copy of Hill's pleading to the Federal Circuit on 28 July 1986,[2] more that six months prior to that court's final decision.

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[1] An affidavit executed by Major John G. Gowan (DNM Dkt. No. 386, 6 Nov 86) states, " ... I served as the Deputy Director of the Directorate of Aerospace Studies ("AFCMD/SA") at Kirtland Air Force Base. ... It is my assessment that the promotion of Robert Blankert to the GS-14 grade level is the result of conversion of the slot formerly occupied by Thomas W. Hill ..." In his declaration (*Id.*), Hill adds, "I have worked with both Mr Feuchter and Robert Blankert ... I am personally aware that both individuals are several years younger than I, although I do not know their exact ages." In his deposition William Jacoby, the selecting official for the Space Division position Hill had applied-for, admits that he was looking for a less senior person for the job. (See Supp. Brief, p. 3.)

[2] Petitioner has concurrently submitted a file-stamped copy of the referenced ducument with a request for leave to lodge it and the Federal Circuit docket sheet during Supreme Court review. The docket sheet shows that the appeal was not docketed until April 1986, *i.e.*, four months after Hill had submitted it and had closed one of his bank accounts.

At page 6 of his pleading Hill plainly alleges, "that a younger employee, Robert Blankert, was promoted into his former position." Hill had previously informed the Circuit Court about ongoing District Court discovery. See "Request for Stay ..." (Fed. Cir. Dkt. No. 86-1081, Entry #7, 21 Apr 86),

> "[A]ppellant has been afforded discovery by [the District] Court. He has thus far taken depositions of seven Air Force officials. In addition, on 4 April 1986 the Court Ordered the Department of the Air Force to release to plaintiff several hundred pages of documents ... Appellant has filed a number of the involved documents with the Court as evidence of discrimination and improper agency action. ... [C]ertain findings of the presiding official for the Merit Systems Protection Board (MSPB) are no longer viable ... "

The notice notwithstanding, the Federal Circuit entered an order denying transfer on 17 July 1986. Hill first learned that the Air Force had replaced him with a younger employee on 20 July 1986, and immediately submitted a Request for Admission to the agency (Supp. Brief, p. 2). Without waiting for a response, Hill filed the above-cited pleading with the Federal Circuit alleging his replacement by Blankert. The Circuit Court denied the pleading without comment and proceeded with review on the merits.

Other than a nebulous claim of "jurisdiction and age discrimination", Respondents do not specify "those issues" afforded "full and fair" review by the Federal Circuit. They assert (Opp. Brief, p.7), "The court below, however, did not give preclusive effect to the MSPB's determination of no discrimination. It gave preclusive effect to the Federal Circuit's de novo determination that petitioner had failed to allege a colorable claim of discrimination." Borrowing a phrase from the D.C. Circuit, this is "a distinction without a difference", as the following discussion shows.

Since the Federal Circuit gave no consideration to discovery in the District Court proceeding or to Hill's claim that he had been replaced by the younger Blankert, it follows that review was limited to the contents of the MSPB record. This conclusion is consistent with the opinion in *Hill v. Dept. of Air Force*, 796 F.2d 146 (Fed.Cir. 1986), and the unreported final decision in Hill's case. See Pet. Ap. E herewith, "We must affirm the board's decision because it was supported by substantial evidence and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Court provided a citiation in support of its decision, *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

The citation confirms[3] that the Federal Circuit was constrained by law not to afford Hill *de novo*[4] review of anything, especially the merit of a claim filed in the District Court under provisions of the Age Discrimination in Employment Act (ADEA). See *Hayes*, at 1537, "This court's scope of review of MSPB decisions is defined and limited by statute. ... In applying these criteria, the court recognizes that it should not try to place itself in the shoes of the agency and second-guess it. ... The record need only disclose such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached. ... This has been our consistent view and that of our predecessor, the United States Court of Claims, for many years, both before and after the Civil Service Reform Act of 1978."

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[3] See also *Brewer v. U.S. Postal Service*, 647 F.2d 1093, 1096 (Fed.Cir. 1981), *cert. denied*, 454 U.S. 1141 (1982), "In determining whether the Board's decision is supported by substantial evidence the standard is **not** what the Court would believe on a *de novo* appraisal ..."

[4] See *Nabors v. United States*, 568 F.2d 657, 669 (9th Cir. 1978), holding that "[T]he language of 29 U.S.C.§ 633a(c), 'A civil action ... for such legal or equitable relief as will effectuate the purposes of this chapter' would be to us a most unusual way of specifying review on an administrative record."

The courts in the Tenth Circuit have held that the penalty for Hill's failure to allege future replacement by a younger employee at the time of MSPB appeal is loss of right to *de novo* review in District Court, regardless of facts. This conclusion cannot be reconciled with the holdings of *Chandler v. Roudebush*, 425 U.S. 840 (1976), and *Astoria F.S. & L. Ass'n. v. Solimino*, 501 U.S. 104 (1991), denying preclusive effect to administrative findings on discrimination claims of federal employees.[5]

Furthermore, the Solicitor General's position in this petition is inconsistent with his stated position in *Stevens v. Dept. of Treasury*, 500 U.S. 1 (1991). The key issue in *Stevens* was failure to comply with procedures required for obtaining administrative review of age discrimination. After certiorari was granted, the Solicitor General took the position (*Id.*, at 9) that "[A] federal employee who elects agency review of an age discrimination claim need not exhaust his administrative remedies before bringing a civil action." As a result, the Supreme Court reversed the lower court, but declined to rule on the merits of the exhaustion issue, indicating that it would fade with time if not resolved by future litigation. Hill's position, involving an adjudged inadequacy in exhaustion of administrative relief due to MSPB pleading insufficiency, is not substantively different from *Stevens*. The issue has not faded, as the Solicitor General no longer advocates his *Stevens* position, even though it appears in a different manner.

In sum, the lower courts have denied Hill the additional protection of District Court review of an adverse personnel action which Congress has provided to his class. See *O'Connor v. Consolidated Coin Caterers, Inc.*, 116 S.Ct. 1307 (1 Apr 1996). The denial was based not on any District Court finding, but rather, on a bar due to Federal Circuit review of a matter for which that Court has no jurisdiction. Congressional Record, Senate Report No. 969, cited at Pet. Brief, p. 12.

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[5] Federal service hirings and promotions normally require months to accomplish, and it is unlikely that firm discrimination evidence would be available within the 30 days allowed for perfecting an MSPB appeal.

II. The Argument That Federal Employee Privacy Act Claims Are Foreclosed By Construction With The CSRA Is Opposed By Texts Of Controlling Statutes.

In opposing certiorari for the Privacy Act matter, Respondents' again decline to challenge the accuracy of facts[6] (Pet. Ap. A) regarding damages endured by Hill as a direct consequence of agency refusal to timely adjudicate a Special Security File (SSF) generated under Hill's name and social security number. Nor do they dispute the District Court finding that the controlling regulation (DOD 5200.2-R/ AFR 205-32; re Pet. Ap. A-6, Defn. Ex. F) requires that the SSF be adjudicated,

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[6] Essential facts regarding the security records may be summarized as follows. On 24 May 1985 Paul S. Britt generated a Special Security File (SSF) under Hill's name and social security number, accusing Hill of being a thief, amoral, unscrupulous, and other derogatory terms. In mid-August 1985 Major General Bernard L. Weiss, Britt's superior, reviewed the SSF and stated in writing that "the acts attributed to [Hill] did not have adverse security significance" and "the withdrawal of [Hill's] security clearance was unwarranted". (Pet. Ap. A-6, Fact #22). However, the agency refused to adjudicate the SSF, even though its controlling regulation required that the SSF be adjudicated, regardless of other actions taken, including separation (*Id.*, Fact #26). Hill appealed to the MSPB to review the security suspension. However, the MSPB held that the firing action was independent of the security action and refused to consider the security matter in any manner. (See note 10 below.) In the later part of 1985 Hill negotiated separate offers of employment from bd Systems in Torrance, California, and Aerojet Corporation in Azusa, California, at salary levels significantly higher than his former Air Force salary. However, when the two companies submitted forms to the Defense Industrial Security Clearance Office (DISCO) to obtain an interim clearance for Hill, DISCO received information from the Air Force central security computer that Hill was considered unsuitable for holding a security clearance. As a result, both companies withdrew their offers of employment, and Hill was unable to secure employment in his chosen career field for more than a year. The District Court found malicious intent on Britt's part (*Id.*, A-4, Fact # 14) and further found that the sole purpose of the security action was to prevent Hill from obtaining employment in the civilian defense community (*Id.*, A-7, Fact #27).

regardless of any other adverse action taken, including separation. Rather, they claim that Britt's separate, vindictive security action against Hill constituted a "personnel practice prohibited by the CSRA [Civil Service Reform Act]" (Opp. Brief, p. 8) and that "an employee may not assert a Privacy Act claim to challenge a personnel practice prohibited by the CSRA" (*Id.*, p. 9).

On 4 September 1987 the District Court refused to dismiss Hill's Privacy Act cause for damages. Opp. Ap. D. Years later (11 January 1993), in response to another agency motion, the Court decided to dismiss the damages claim for reasons not specified in its order. Pet. Ap. B. Upon appeal, the Tenth Circuit held that the basis for dismissal was construction of the Privacy Act vis-à-vis prohibited personnel practices defined by the CSRA (chapter 23). However, Congress has directed the courts not to construe the CSRA to limit remedies afforded by other statutes, which include the Privacy Act. More specifically, on 9 July 1989 Public Law 101-12 (codified in part at 5 U.S.C. § 1222) became effective.

> **"§ 1222. Availability of other remedies**
> Except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

There is no question that the Privacy Act (5 U.S.C. § 552a) lies outside [7] chapter 12 "Merit Systems Protection Board" and is also outside chapter 23 "Merit System Principles", and that section 1221(i) is not applicable to the instant action. There is also no question that section 1222 was directed to the federal courts and that they are bound by its provisions for decisions entered after 9 July 1989.

Clearly, the actions of the District and Circuit Courts

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[7] Hill's Privacy Act cause does not suffer from the plaintiffs' deficiency in *Rivera v. U.S.*, 924 F.2d 948, 954 (9th Cir. 1991), where the Court found no statutory-based cause of action independent of the CSRA.

in 1991 and 1995 violate provisions of the statute.[8] The error is especially egregious when viewed against the background of the purpose of the act (section 2) and Congressional dissatisfaction[9] with (1) the lack of protection afforded to whistleblowers by the MSPB, the Special Counsel, and the federal courts, and (2) a series of federal court decisions, including *Bush v. Lucas*, 462 U.S. 367 (1983), and *U.S. v. Fausto*, 484 U.S. 439 (1988), which have over a period of time expanded the sphere of exclusivity of remedies afforded by the CSRA.

Even if 5 U.S.C. § 1222 had not been enacted, the lower court construction is still improper for the reason that the MSPB determined that the security matter was independent of the firing action,[10] so that Hill's removal would be unaffected by any action the agency might take on the SSF.

For support of their position, Respondents indicate that *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859 (D.C. Cir. 1989), is no longer good case law and casually cite *Kleiman v. Dept. of Energy*, 956 F.2d 335 (1992), which involves a minor, non reviewable position classification dispute labeled by the D.C. Circuit Court (*Id.*, 338) as "not the stuff of which Privacy Act suits are made." A more studied

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[8] A savings provision summarized in Historical and Statutory Notes of the USCA at the beginning of chapter 12 exempts the MSPB, the Special Counsel, and their officers and employees from provisions of the statute for suits commenced prior to its enactment. However, the key issue involved in this Privacy Act matter is not entitlement against the MSPB, but federal court construction of the two statutes in 1991. There is no exemption in P.L. 101-12 for federal court decisions in Privacy Act suits against the Air Force which were pending in July 1989.

[9] See Joint Explanatory Statement, 135 Cong.Rec. S2782-83 (daily ed. March 16, 1989).

[10] See 16 September 85 MSPB order (DNM Dkt. No. 62, MSPB record, vol. II, Item 24), "[T]he presiding official ruled that she will not consider evidence about the suspension of [Hill's] security clearance because it was not the basis for the agency's removal action."

reading of *Kleiman* reveals the following. At 956 F.2d 339, "In short, we think that nothing in *Hubbard [v. U.S. EPA*, 809 F.2d 1 (D.C. Cir. 1986)] can be construed as conflicting with our decision today. [5] ...

[5] This harmony also means that nothing we say today should be taken to cast doubt on *Hubbard's* statement that 'the Privacy Act permits a federal job applicant to recover damages for an adverse personnel action *actually caused* by an *inaccurate* or incomplete record.' 809 F.2d at 5."

See also *Pilon v. U.S. Dept. of Justice*, 73 F.3d 1111 (D.C. Cir. 1996), allowing a Privacy Act suit for damages exceeding one-half million dollars for the unauthorized disclosure of a record by the supervisor of a former federal employee, even though the recipient was already familiar with the record.

Finally, the novel attempt to label untimely-maintained security records[11] designed solely (District Court determination) to prevent Hill's employment outside the Air Force as a prohibited personnel practice under the CSRA is opposed by the text of the CSRA. Positions offered to Hill by Aerojet or bd Systems or any contractor are not "covered positions" within the meaning of 5 U.S.C. § 2802(a)(2)(B) for which the eleven proscriptions set out at section 2802(b) apply. In addition, it would not be possible for the MSPB or the Special Counsel, which the CSRA has charged with responsibility to correct such practices, to discharge their duties if an adverse security action could be defined as a prohibited personnel practice. See *Dept. of Navy v. Egan*, 108 S.Ct. 818 (1988).

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[11] The key Privacy Act issue is failure to timely maintain a system of records, as expressedly required by the Act. If the SSF had been adjudicated within the time specified by the controlling regulation, the matter would have been resolved before DISCO querry. However, Britt's stated intent was that the matter never be cleared. Both bd Systems and Aerojet officials were fully aware of the firing action, but were unconcerned so long as the security issue was resolved, as evidenced by an affidavit filed on Hill's behalf by bd's President. Hill was later employed by bd Systems and worked there for 4 years before establishing own business.

III. Supreme Court Decisions Support Claims Against Federal Employees For Fourth Amendment Torts.

In *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held (*Id.*, 385 n. 28) that, "certain actions by supervisors against federal employees, such as wire-tapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme." In a matter involving suit brought by a federal employee against a former supervisor, *Siegert v. Gilley*, 500 US 226, 231 (1991), the Court restated the requirements that the suit must "allege the violation of a clearly established constitutional right" and that "malice is a requisite showing to avoid the bar of qualified immunity" (*Id.*, concurring opinion at 289).

The District Court found that Britt "was involved in monitoring of Plaintiff's telephone conversations at his place of employment and in recruiting others to do the same." Opp. Ap. 7a. The MSPB record (*e.g.*, MSPB Tr., vol 1, 198, 246-8, DNM Dkt. No.62) shows that Bruno Manz and other employees under Britt's supervision eavesdropped and reported to him on Hill's telephone and other conversations, regarding such matters as discussions between Hill and his attorney during divorce proceedings, calls from Hill's marriage counselor, and calls from D.C. Court officials. No other member of Hill's employing organization was subjected to such[12] intru-

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[12] See *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987), refusing to release O'Connor under a claim of immunity accruing from an employment relationship and holding at 1504, "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as investigations of work-related misconduct, should be judged by a standard of reasonableness. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable." See also, *Butz v. Economou*, 98 S.Ct. 2894, 2909 (1978) holding that there is no distinction for purposes of immunity law between Section 1983 claims against state officials (*e.g.*, Ortega) and constitutional claims against federal officials.

sions of privacy in the workplace. *Id.* In addition, during his deposition David W. Hickman, a member of the Staff Judge Advocate at Kirtland, testified that he counseled Britt and cautioned him against violating Hill's constitutional rights.

The District Court repeatedly found malice on Britt's part (Pet. Ap. A-3, 4, 5) and cited the above-referenced section of *Bush*, holding that "Plaintiff properly suggests that Britt's actions were something other than 'personnel actions' within the purview of any statutory scheme." Nevertheless, the Tenth Circuit, *Hill v. Dept. of Air Force*, 884 F.2d 1318, *cert. denied*, 495 U.S. 947 (1990), held that "there is no *Bivens* remedy" and ordered Britt released without certification that his acts were within the scope of his employment.[13]

Conclusion

For the reasons stated, the Supreme Court should issue a summary writ, directing the District Court to find its own facts regarding Hill's claim of age discrimination, following amendment of the complaint to include facts not available at the time suit was filed. In the alternative, the Court should issue a writ, under provisions of 5 U.S.C. § 1222,[14] directing the District Court to set trial of Hill's Privacy Act cause for damages. In the second alternative, certiorari should be granted to resolve the age discrimination, Privacy Act, and constitutional tort issues involved in this petition.

Respectfully submitted.

Thomas W. Hill, Pro Se

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[13] The D.C. District Court held oppositely in a similar action. See *McGregor v. Greer*, 748 F.Supp. 881 (D.D.C. 1990), citing *Bush* and also citing *Schowengerdt v. General Dynamics Corp.* 823 F.2d 1328, 1339 (9th Cir. 1987), as bases for not construing the CSRA to preclude *Bivens* claims against federal employees for fourth amendment violations.

[14] Hill petitioned the Tenth Circuit for a writ regarding the age discrimination cause at the outset of his appeal, and later pled the requirements of Public Law 101-12. See, 10th Cir. No. 95-2017, Dkt. Nos. 8, 56.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

Thomas W. Hill, Petitioner,	)	
v.	)	Appeal No. 86-1081
Department of the Air Force, Respondent.	)	

DECIDED: February 10, 1987

Before SMITH, NEWMAN, and BISSELL, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (board), docket No. DE07528510204, which became final on December 11, 1985, affirming the removal of Thomas W. Hill by the Department of the Air Force, is affirmed.

OPINION

We must affirm the board's decision because it was supported by substantial evidence and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).